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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 CIRO CHARLES HICKS,

4 Plaintiff,

5 v.

11 CV 8158 (KBF)

6 VANE LINE BUNKERING, INC. and
7 the TUG PATRIOT, In Rem,

8 Defendants.

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9
10 September 4, 2012
9:05 a.m.

11 Before:

12 HON. KATHERINE B. FORREST,

13 District Judge

14 APPEARANCES

15 HOFMANN & SCHWEITZER
Attorneys for Plaintiff
16 BY: PAUL T. HOFMANN

17 HILL BETTS & NASH
Attorneys for Defendants
18 BY: JAMES FORDE
BORIANA FARRAR
19 KENNETH F. MCGINIS

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1 THE DEPUTY CLERK: All rise.

2 THE COURT: Good morning, everyone. You could be
3 seated. Thank you.

4 (Case called)

5 THE COURT: You can all be seated. Thank you.

6 MR. HOFMANN: Paul Hofmann, Hofmann & Schweitzer for
7 the plaintiff.

8 THE COURT: Good morning, Mr. Hofmann.

9 MR. FORDE: Jim Forde for Vane Line Bunkering. It's
10 been mislabeled on the docket for awhile now, but it's V-a-n-e
11 Line Bunkering.

12 THE COURT: It's B-a-n-e?

13 MR. FORDE: V as in Victor.

14 THE COURT: Oh, V-a-n-e. All right.

15 MR. FORDE: Jim Forde from Hill Betts & and Nash.

16 MS. FARRAR: Boriana Farrar from Hill Betts & Nash for
17 Vane Line Bunkering.

18 THE COURT: Good morning.

19 MR. MCGINIS: Kenneth McGinis, Hill Betts & Nash for
20 Vane Line Bunkering, your Honor.

21 THE COURT: Good morning, all.

22 All right, we are here to commence the trial in this
23 matter. We will have a jury that will be available to us
24 probably close to quarter to 10:00 to 10:00 o'clock is my
25 guess. The reason for that is there's a criminal matter also

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1 scheduled for jury selection today, and that would go first.
2 They won't do the whole selection, but they'll pick it --
3 they'll pull the panel first to make sure that they've got
4 enough people. We requested and ordered a jury, a group of in
5 excess of 20 for us to choose from, so ours will come next so,
6 assuming all the jurors, prospective jurors show up, and we
7 will have an ample number, and we should get them fairly fairly
8 quickly.

9 I wanted to go over a couple of housekeeping matters
10 first, and then address whatever you folks would like to
11 address in addition to these matters.

12 First, we are going to select a jury of eight. We can
13 get down to, if you will, a jury of six before we run into any
14 issues. So we'll have eight, and all eight would deliberate.
15 There won't be any alternates. But if we lose one for any
16 reason or lose two, we would then be able to deliberate with
17 the remaining six. You folks, of course, can let me know --
18 and I think we've discussed this very briefly last time --
19 whether or not you are looking for unanimity with the eight or
20 in a civil trial, of course, we can go for less than unanimous.
21 So, for instance, I've had civil cases where they've wanted to
22 have seven and one or six and two, but in the instance where
23 we've lost one or two, it then becomes unanimous. If there is
24 no agreement, then well go with unanimous on whomever is left.
25 Do you folks have a view?

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1 MR. FORDE: All right, seven to one.

2 THE COURT: Seven one, all right. So seven one it is.

3 So it's got to be seven in agreement and one can be not in
4 agreement. That would be as to each of the individual
5 questions on the verdict form, just so that we're all in
6 agreement. So there will be the particular causes of action,
7 and there will be a couple of special questions of course, such
8 as if they happen to find, you know, contributory negligence,
9 the percentage, there would have to be a seven to one answer to
10 that as well. It doesn't have to be the same seven for each
11 question, but they'd be instructed that it would be seven and
12 one for each question. If we lose a juror, then it will be
13 unanimous. Okay?

14 MR. HOFMANN: Agreed.

15 THE COURT: All right. The second issue that I wanted
16 to deal with goes to one of the points from my trial process
17 order from last week which had to do with deposition
18 designations. I wanted to be sure that we were all on the same
19 page about the use of those designations. And in the order I
20 had asked, one, that if people are going to be testifying live,
21 that we not stand up and read designations from these people.
22 That would be, I think, unnecessary. You can use those
23 designations to elicit the testimony on cross-examination. If
24 you wanted to have a little bit of leeway to go beyond the
25 scope of the direct to get out particularly interesting

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1 material that was elicited at the deposition, I will allow that
2 if there is such a situation.

3 And then, secondly, for the videotape I wanted to make
4 sure that all colloquy was excluded. Are we all on the same
5 page?

6 MR. HOFMANN: We're on the same page, Judge.

7 As to the depositions, the live witnesses, we're going
8 to be just using the deposition transcripts for
9 cross-examination.

10 And there is no colloquy really to be concerned about
11 with the videotapes. We've, counsel and I have agreed we're
12 just going to let them run. There's no arguments or anything.
13 And the objections that were stated very quietly are waived,
14 so. Agreed?

15 MR. FORDE: That's agreed, your Honor.

16 THE COURT: Okay.

17 MR. FORDE: It just seems to make more sense to do it
18 that way.

19 THE COURT: All right, terrific.

20 Now the third issue I just wanted to make sure that we
21 had covered was whether there were any documents, questions,
22 concerns about admissibility. I had gone through some things
23 and wanted to make sure that we all understood what was going
24 to the offered or not offered and whether or not we needed to
25 present anything right now and get a specific ruling.

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1 MR. HOFMANN: Yeah, I think that you, from the
2 plaintiff's perspective, everything that you raised tracks what
3 my objections were, and counsel will have to address those.

4 As to the other issues, counsel and I, as our firms
5 have practiced for many years, and he and I have practiced each
6 against each other many years, we basically agreed that
7 everything that's there, except for those few that have
8 objections, will come in, they're all relevant. And you may
9 want to address the Judge's --

10 MR. FORDE: Well, one of the -- I really didn't have
11 very many objections to -- I don't think I had any objections
12 to your exhibits.

13 MR. HOFMANN: Right.

14 MR. FORDE: But there was one particular exhibit that
15 had third-party handwriting and that has been redacted, so I've
16 addressed counsel's concern.

17 THE COURT: Okay, all right. There had been, I noted,
18 some letters that were proposed as exhibits, and there weren't
19 objections raised as to those letters. They looked to be
20 correspondence from the way in which they were worded, and
21 what's the intended use for those?

22 MR. FORDE: At this stage of the game I think, your
23 Honor, both of us tried cases and it's basically, just grab
24 everything that we possibly can, and there will be
25 significantly less documents that would be marked.

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1 THE COURT: All right, terrific. Even though --

2 MR. HOFMANN: Can I address though that, Judge?

3 THE COURT: Sure.

4 MR. HOFMANN: Some of -- I think some of the
5 correspondence is our exhibits I propose, and they were -- they
6 are business matters, in that my client is, as you know, is
7 claiming a claim for maintenance and cure. Those letters were
8 directly addressing either to counsel when he was in the case
9 or to Mr. Neubrand of Vane, requesting maintenance and cure for
10 my client. So those were business transactions, not, gee,
11 how -- you know, let's have lunch and talk about the case, that
12 type of thing. So that's why they are relevant.

13 And if I -- if Jim had stated an objection, then I
14 would have to get up on the stand and authenticate them, and
15 he's not made that objection because I think he understands
16 that these were requests for maintenance and cure and they
17 might go to the issue of before the Court.

18 THE COURT: All right, so why don't we do it this way,
19 though. What I want to make sure is that we don't, even by
20 stipulation, present the jury with material that would not
21 otherwise be admissible. It sounds like you'll be able to ask
22 your client just directly whether or not he received
23 maintenance and cure or whether or not he instructed counsel to
24 make such a request and was it received. In other words, I
25 don't know that you'll need the letters. And if you do need

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1 the letters, you can use them on cross, but I don't know that
2 they would -- I do not know that they would need to be admitted
3 as evidence.

4 MR. HOFMANN: Well, the problem with that, Judge, is
5 we are not just claiming claim for maintenance and cure. We're
6 also claiming that the failure to pay maintenance and cure was
7 unreasonable and may have raised to the level of arbitrary and
8 capricious. And the content of those letters does say to the
9 other side, look, here are medical records showing my client's
10 entitled to this. I think the jury needs to know what those
11 requests were and what the content of the requests were and
12 what the reasoning was so they can judge whether Vane Line
13 acted appropriately.

14 THE COURT: Well, maybe it's best, then, that I see
15 the letters. Because if they're being offered for the fact
16 that they were said and not for the truth, then they wouldn't
17 fall under -- they wouldn't be hearsay, and so there is not
18 really going to be an issue. So why don't you --

19 MR. HOFMANN: Exactly. And they are more than just
20 offered for the truth. They are offered for the purpose of the
21 statements that we were stating to them and that they needed to
22 respond to, and that's --

23 THE COURT: Right, all right. So why don't you, if
24 you could just hand my Deputy a copy of the couple that you
25 think you're going to use, I'll take a quick look at them, and

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1 then if I have any other issues we'll deal with them.

2 MR. HOFMANN: Right.

3 THE COURT: Okay, any other document issues that you
4 folks can think of?

5 Well, let me then raise a related issue, which is
6 demonstratives. I see that there are some pictures over here
7 on the left-hand side. I think those are just bigger pictures
8 of the smaller photographs which I've seen pretrial. Is that
9 right?

10 MR. HOFMANN: Correct.

11 MR. FORDE: Correct, your Honor.

12 THE COURT: Okay. So you both have agreed on that
13 those are okay, shall I say?

14 MR. FORDE: Yes.

15 THE COURT: All right. I've had instances where
16 people have blown things up, and in the blowing up process some
17 things are emphasized which otherwise others don't want to have
18 emphasized. That doesn't seem the case here with a ship. It
19 can be more of a case if there is a black eye or something like
20 that.

21 All right. The other issues. I understand that there
22 is a video that is, essentially, a reenactment of the moving of
23 the donut?

24 MR. HOFMANN: 18 seconds worth of, yes.

25 MR. FORDE: That's all it is.

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1 THE COURT: All right. And you folks are both okay
2 with that?

3 MR. FORDE: Yes.

4 MR. HOFMANN: Yes, Judge.

5 THE COURT: All right. All right, now, witnesses and
6 duration. Who do we have really who is going to be coming here
7 and in what order and how long are they going to be?

8 MR. HOFMANN: Charles Hicks will be my first, will be
9 the plaintiff's first witness himself, and that should take on
10 direct I would assume about two to two and a half hours because
11 there are many many topics to deal with.

12 Next my intention was to play the one hour videotape
13 of Dr. Rizzo.

14 I may have about five to ten minutes of -- at the
15 most, five minutes of direct examination of Mrs. Hicks who is
16 here.

17 Then tomorrow morning, sort of in a joint presentation
18 Vincent Lusardi will be here and we will run through his
19 direct, rather than playing his videotape deposition, and that
20 will be it for live witnesses and videotape witnesses for the
21 plaintiff.

22 THE COURT: All right. What do we have for
23 defendants?

24 MR. FORDE: And then segueing after Mr. Lusardi, we're
25 going to, depending on how it goes, we have a Dr. Lisser, who

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1 is coming on Wednesday afternoon. He'll be there. He's
2 leaving at noon from his offices to be here testifying live.

3 Failing that, we also have the direct testimony of
4 Captain Comiskey. That testimony should take approximate --
5 direct approximately take about one to two hours.

6 And then we have the -- I'm missing one. Who is the
7 next one? We've got -- oh, sorry, Bill. We got Bill Neubrand
8 who is going to be testifying as the corporate representative
9 of Vane Line Bunkering, and he'll be roughly about 40 minutes
10 on direct, and that's it.

11 THE COURT: All right. And how long did you say
12 Lisser's testimony was going to be?

13 MR. FORDE: If it goes an hour, it's going to be a
14 lot.

15 THE COURT: All right. Now, just so that we're clear
16 because we've mentioned Mr. Lusardi tomorrow morning,
17 Mr. Lisser, Dr. Lisser Wednesday afternoon, and Captain
18 Comiskey after that. As I stated in the order issued last
19 week, and have also mentioned, we're going to go straight till
20 5:00 and we'll end, you know, promptly at 5:00, we won't keep
21 the jury past 5:00, but we want to have witnesses who fill up
22 that entire time. So if, for instance, we run out of witnesses
23 at 4:00 o'clock, then we'll call somebody out of order.

24 MR. FORDE: Your Honor, we also have in the can a
25 video deposition of Rich DiNapoli who is -- he's going to be --

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1 and that ran 45 minutes?

2 MR. HOFMANN: 40 minutes.

3 MR. FORDE: 40 minutes. And we have the Captain
4 Comiskey on standby here already, as well as Mr. Neubrand. So
5 we can swap witnesses in as needed.

6 THE COURT: Okay, that's terrific. All right.

7 MR. FORDE: And we're also going to be reading in some
8 deposition testimony of Mr, I think you are as well, Andrew
9 Johnson and Glen Scroggins, which shouldn't take that much. It
10 wasn't that much testimony.

11 THE COURT: All right. And for that testimony you
12 were just going to read designations and the counters just
13 straight through.

14 MR. FORDE: Yeah, if it's okay with you, your Honor,
15 I'd like to put somebody in the witness box answering, that's
16 all.

17 THE COURT: Yes. No voice inflection if you could
18 because we don't really know how it was said, and so sometimes
19 people get dramatic and just sort of run through it.

20 MR. FORDE: Fair enough, your Honor.

21 THE COURT: Okay. All right. That then gives me a
22 sense of things. So today is Tuesday. Sounds like this will
23 go on till probably Thursday. Maybe we'll end Wednesday late
24 afternoon, but we could end Thursday morning, something like
25 that.

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1 MR. FORDE: Yes.

2 THE COURT: All right. Well go into closings directly
3 after the end of the defendant's case, assuming there is no
4 rebuttal case, but we'll go straight into closings so that you
5 folks are prepared for that. We won't, if it's noon, break
6 until the next day, being mindful of the jury's time. So we'll
7 tell them this morning, it'll help us to get a panel very
8 quickly that this will be something that won't go over into
9 next week likely. It'll, you know, I always give myself
10 maneuvering room and give you maneuvering room because things
11 happen, but I'll tell them we expect it to be a relatively
12 short trial. That prevents the biggest, largest objection
13 which is, I can't possibly do this because of some scheduling
14 issue from arising.

15 Now, in terms of the jury charges, we have taken each
16 of -- taken the charges which you folks have submitted. We
17 also looked very carefully at the objections and have created
18 our set of charges, which we'll give to you probably later on
19 this afternoon, and then we'll have a charging conference
20 tomorrow morning at 9:00. What I'll propose to do is just
21 literally go through the them page by page, and if you've got a
22 concern, you'll raise the concern. If they get to you really
23 late, then we'll do it during the midmorning break or something
24 else and give you a little bit more time. And the kinds of
25 concerns that I'll be looking for are things that are really

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1 substantive as opposed to switching around my colloquial
2 wording that I do for the jury.

3 I'll tell you right now that the charge that we are
4 currently struggling over the most is punitive damages. There
5 is no Second Circuit decision currently on the availability of
6 punitive damages in this kind of case. It's clear that under
7 the Jones Act punitive damages are not allowed for Maritime.
8 On seaworthiness claims it is I would say an unsettled issue in
9 terms of same thing with the maintenance and cure issue in the
10 Second Circuit. There are other Circuits which have said no to
11 those kinds of case. There are some cases in the Southern
12 District, and we are sorting through that and I will come to a
13 position which I will state for the record, one way or the
14 other, so that should somebody later on want to make an appeal
15 issue out of either the availability or lack of availability of
16 punitive damages, you'll have the rationale on the record and
17 be able to raise that then whoever sees fit, if you see fit.

18 MR. FORDE: Your Honor?

19 THE COURT: Yes.

20 MR. FORDE: To that, just procedurally. Should we
21 then, if we are objecting to one of your charges, put our
22 objection on the record.

23 THE COURT: Absolutely, that would be the purpose.
24 The letters which you have submitted will be effectively gone,
25 if you will, and we will be dealing with the Court having

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1 reviewed carefully your objections, having gone through the
2 case law, and made my own determination as to the appropriate
3 wording of the instructions. If you object, you'll state your
4 objection. I'll listen to why. I'll make a ruling. Your
5 objection will then be there for the record for later on. If
6 there's no objection, then I'm going to turn the page and
7 you'll have waived any objection to that particular
8 instruction. That's not to encourage unnecessary objections,
9 but it is to tell you that if you want to preserve it, preserve
10 it.

11 Okay, speaking of objections. On a different note,
12 the objections that you folks, when there is testimony going
13 on -- hopefully during the openings and closings there won't be
14 a need for objections. If there is, there is. But I'm sure
15 you folks -- it sounds like you've tried cases against each
16 other in the past and will have a sense of what you're likely
17 to do. But I try, unless necessary really, truly necessary, to
18 leave the openings and closings to let them flow. But if
19 there's something that you need to preserve for appeal, you
20 need to preserve it for appeal.

21 In terms of the objections generally, they should be
22 one word, just objection. Because it's a jury trial, stand up
23 say objection, I will rule on it. Hopefully I'll be aware
24 enough as to where you're going and why I think you're making
25 the objection. And you can then argue to the Court of Appeals

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1 if you want, she overruled my objection as a hearsay based
2 objection and there is no hearsay exception to this or, you
3 know, whatever. If I feel that I need to say more, then I'll
4 either do it at sidebar or I'll say two words like, you know,
5 401 and hopefully you'll be aware enough of the Rules of
6 Evidence to understand what I'm getting at and that will be it
7 and that will be what we'll have. But I don't want to have
8 speaking objections in front of the jury because it can
9 obviously tread over into argument. They don't need to have
10 their time wasted. They'll be confused. It may seem like I'm
11 picking on somebody if I keep overruling somebody who makes a
12 lot of speaking objections, so we don't want that. So one
13 word. That then leads to sidebars asking for side bars. I
14 will avoid sidebars as much as possible. Because they will
15 take a lot of time. And, again, I'm mindful of keeping things
16 really just moving right along. Hopefully you're not designing
17 your direct and cross on the fly, you've got it in the can and
18 will be able to move things through in a speedy fashion.
19 Sidebars require, obviously, the Court Reporter to move over
20 out of the hearing of the jury and to be in this area over here
21 it, takes time, he's got to plug back in, unless he's got
22 enough charge left to do it on battery, but it takes time. So
23 if we really need sidebar, I will have a sidebar. If you
24 really think I didn't get your objection, it's really
25 important, and there's a serious issue here that isn't just a

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1 serious objection, but a serious objection where we're going to
2 run into mistrial or something else where you really need to
3 deal with it, then you can say, you know, I'd really like a
4 sidebar. I will honor that and I will allow you to have
5 sidebar, but use them wisely. Some judges will have a lot of
6 sidebars. I'm one of the ones who is going down the route of
7 not.

8 In terms of the voir dire. I will conduct it from
9 here, because I think I've mentioned to you I will have a group
10 out there, we will seat eight in the box itself. I'll tell
11 everybody that we're going to -- I'm going to ask a lot of
12 questions. They should think about whether or not they've got
13 yes answers to the questions, and if they do, not to raise
14 their hands if they're in the audience, but to remember that.
15 Those who have yes answers, depending upon the nature of the
16 yes answer, I'll either speak to them from here or I'll take it
17 at sidebar. But not everything happens at sidebar, again, it's
18 because it goes much faster if I just take it from here. So
19 having been on a jury before, three hands go up, okay, without
20 telling me, what verdict you reached, you know, was it criminal
21 or civil, they'll say what they say. Did you reach a verdict,
22 yes or no? Is there anything about that jury service that
23 would prevent you from being fair in this case. That's the
24 nature of the way I would handle that kind of thing. If they
25 say is there any -- if I ask is there any medical reason why

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1 you could not sit for a jury trial of this length and somebody
2 raises their hand, I will take that over at sidebar. I won't
3 make people go into their medical conditions in open court.
4 But that's the way we'll handle the voir dire sidebars.

5 Now, that voir dire process, when I'm going through
6 those questions, I'm essentially going through the cause
7 challenges. I will ask a catch all at the end, is there any
8 reason that I haven't mentioned why you don't think you could
9 be a fair jury in this matter, and we'll deal with those
10 over -- that would be a sidebar-type question. But once I'm
11 done with those, people may be gone because people know
12 somebody or can't sit for the trial or don't understand
13 English, they'll be gone. We'll replace people. Once we're
14 done, we've got eight people, and we've gone through that
15 entire process, at that point we are done with the cause and
16 we're going -- we'll go through the jury questionnaire and
17 we'll be done with the cause. You'll then get the opportunity
18 to have your three peremptories. We'll do them in three
19 tranches but they will be simultaneous. So you'll do one
20 tranche, you can both -- give a post-it to my Deputy. Both may
21 want to strike juror number two, only juror number two will be
22 removed, we'll replace juror number two. I'll say did you
23 answer yes to any of the questions? I'll go through the
24 questionnaire with the new juror number two, then you'll be
25 given your opportunity for your second strike. We'll do the

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1 same thing. Then you'll be given your opportunity for your
2 third strike. After your third strike, just be aware, and I
3 think it is obvious and you've done this before, whoever comes
4 in they're in, so long as there is no cause. We go through the
5 same questions, go through the questionnaire, but you don't get
6 a peremptory. So when you're doing your last strike, if you
7 like your eight, you may or may not want to get somebody
8 random. It's up to you, all right. They're randomly drawn,
9 they're not in order. I know it's a sort of unusual way of
10 picking a jury, it's a combination of different styles, but it
11 goes very quickly, so it works.

12 All right. In terms of the verdict sheet, we'll give
13 you that as well either this afternoon or probably a little bit
14 later than that, because once our jury charges are baked, we'll
15 do a version of the verdict form. It's relatively straight
16 forward, but there are a few special questions that have to be
17 asked depending upon where some of the charges wording comes
18 out. And for that as well, I'll ask you specifically at the
19 charge conference whether you have objections to the manner of
20 the wording of the form of the verdict sheet. And if you have
21 any objections, state them for the record. If you want to
22 lodge an objection, then I'll rule on it.

23 Okay, those are the things that I had. Did you folks
24 have anything that you want to raise?

25 MR. HOFMANN: Just a couple things, Judge. For the

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1 benefit of the Court, I gave counsel one of these also, it's
2 sort of an exhibit list that you may or may not want to use to
3 follow as to what would be offered and admitted.

4 The next thing. I heard what you're saying about the
5 punitive damages issue in a maintenance and cure case, and
6 you're referring to the Second Circuit, I'm sure that was the
7 decision and others. I think the issue's one that's foreclosed
8 for you to have to rule on. Atlantic Sounding versus Townsend
9 out of the Supreme Court last year tell you that punitive
10 damages in maintenance and cure case are available. It may not
11 apply in this case under the facts, but the Supreme Court
12 Justice Thomas has clearly ruled that in a punitive damage,
13 excuse me, in a maintenance and cure case, punitive damages may
14 be awarded.

15 THE COURT: All right. What's the name of that case?

16 MR. HOFMANN: Atlantic Sounding versus Townsend.

17 THE COURT: All right, I'm not sure if that's one of
18 the ones I've looked at, Supreme Court on that issue.

19 MR. HOFMANN: That was last year that the issue came
20 up to a head.

21 THE COURT: All right. So we will look at that and
22 that will -- you know, the Court will state it's overall
23 rationale one way or the other.

24 MR. HOFMANN: I'm sure you will, but since you didn't
25 mention the Supreme Court, I figured that --

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1 THE COURT: It would be helpful. Of course the
2 Supreme Court is above the Second Circuit.

3 MR. HOFMANN: At least some judges think so.

4 But you mentioned the verdict sheet. I just, you
5 know, last minute reviewing it I saw that there are two
6 questions that I think should be posed, and I will -- I know
7 you're working on this and hate last minute, but it has to do
8 with the maintenance and cure issue. There is -- and I'll
9 write it out and give you the proposal and a give a copy to
10 Mr. Forde. It would be two additional questions and I want to
11 get that to you as soon as possible.

12 THE COURT: All right. Why don't you do that. I
13 don't mind if it's handwritten. It's better if you can both
14 reach agreement that these are appropriate questions to ask to
15 agree. If you can't, then so be it, I'll rule on it.

16 MR. HOFMANN: Since we're going to be waiting a little
17 bit, I can talk to Mr. Forde about that.

18 THE COURT: Sure.

19 MR. HOFMANN: The last thing I just want to state for
20 the record. I heard what you said you're going to do with the
21 voir dire. I remember we had a short debate at the last -- at
22 the preliminary conference a couple months ago about once new
23 jurors are in -- are in the box, we would not have the
24 opportunity to save and use peremptories. I --

25 THE COURT: Well, you've got the three, and we're

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1 going to do them -- I may have described three simultaneously
2 all at once. That we're not going to do. We're going to do
3 them three rounds. So you will have one round, let's just say
4 you replace number two and you don't like the new number two,
5 you can strike the new number two --

6 MR. HOFMANN: Okay.

7 THE COURT: -- with your second peremptory.

8 MR. HOFMANN: Okay.

9 THE COURT: All right.

10 MR. HOFMANN: All right. That is a little bit
11 different from what I remember you had said.

12 THE COURT: Let me make sure that everybody
13 understands this process, because it is very important to your
14 strategy of how you're going to go through --

15 MR. HOFMANN: Exactly.

16 THE COURT: Of the eight, there will be eight there.
17 I'll have gone through my list of questions. They'll have
18 stood up and they'll do, stand up each and do their short
19 questionnaire who they are, what TV shows they watch, what
20 occupations they have, et cetera, et cetera. If nothing falls
21 out of that which causes concern, I'll say thank you very much.
22 I'll explain to them they shouldn't care or think twice about
23 what's going to happen next, which is that counsel have an
24 opportunity to excuse one of them for any reason at all -- not
25 really any reason at all, but for --

C94ZHIC1

1 MR. HOFMANN: Constitutionally appropriate.

2 THE COURT: For constitutionally appropriate reasons.
3 And we'll then take them -- we'll do one round. You get one
4 number during that first round, just give me one number each,
5 each give me one number at the same time. Let's just say one
6 person picks juror number two, one person picks juror number
7 four. They're both excused. Two new ones come in. I say, are
8 there any questions you answered yes to? I don't speak
9 English. Okay, you're gone. Put in somebody else. Any
10 questions you answered yes to? No. Okay. Read the
11 questionnaire. They read the questionnaire. Round number two,
12 you can both strike whoever you strike. You can strike two
13 more people might get struck, numbers one and five. Two more
14 people come in. Then you're at your last round. At that point
15 I'll go through the same thing, any yes questions, read the
16 questionnaire. If that person, those people stay in the box
17 we've got eight, you now have your final shot at striking one
18 more person, or not. My only point is that when you strike
19 that person, whoever gets filled in, I'll go through the cause
20 and the questionnaire, but if there is no cause challenge,
21 they're done.

22 MR. HOFMANN: I understand that and that's acceptable
23 to me.

24 THE COURT: I know you didn't like the three and
25 three. It goes much faster, but --

C94ZHIC1

1 MR. HOFMANN: The way you had described it --

2 THE COURT: It was three and three.

3 MR. HOFMANN: No. You said you're going to put in
4 eight and we're going to use all --

5 THE COURT: Three.

6 MR. HOFMANN: -- peremptories on those eight and then
7 whoever came in, we wouldn't have the chance to vet. And the
8 way you've described it your process is --

9 THE COURT: Okay.

10 MR. HOFMANN: -- very familiar and acceptable.

11 THE COURT: Okay.

12 Now witnesses who are present. I take it neither of
13 you have any objection to people being present, other than a
14 corporate representative? Because I see there are people in
15 the courtroom.

16 MR. HOFMANN: The only non-party witnesses is
17 Mrs. Hicks, who is here with her husband.

18 THE COURT: All right, okay. So everybody's set with
19 that? All right, so my Deputy will not look around for people
20 who happen to wander in and make sure that they're taken out of
21 the courtroom. You're both fine with people's presence in the
22 courtroom, right?

23 MR. FORDE: Yes.

24 MR. HOFMANN: Yes, your Honor. Thank you.

25 THE COURT: Okay, anything else? No, all right. We

C94ZHIC1

1 should hear from the jury assembly room 10:00 o'clock, okay, so
2 not quarter to 10:00, but 10:00. You got 20 minutes. So why
3 don't you try to work out your verdict form wording if you
4 want. If you can agree on it, then hand it to my Clerk. And
5 if you can't agree on it, you can still hand it to my Clerk,
6 but it will be unagreed.

7 MR. HOFMANN: Right.

8 THE COURT: Okay. And I will then make a ruling.
9 Thanks, I'll be back in a few minutes then.

10 THE DEPUTY CLERK: All rise.

11 (Continued on next page)

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C94MHIC2

1 (A jury of 8 empanelled and sworn)

2 THE COURT: Now that you have been sworn I am going to
3 give you some preliminary instructions about your role as
4 jurors in this case. After that we are going to have opening
5 statements by counsel, then we are going to go directly into
6 the evidence. After all of the evidence has been presented, we
7 will have closing statements or summations, and then you'll
8 deliberate.

9 I do want to, at the outset, promise to you that I am
10 going to try to be very efficient with your time. The thing
11 that I will keep pressing counsel for is to keep the witnesses
12 moving along and to try to keep things generally moving along
13 so that your time is used as efficiently as possible. That's
14 my commitment to you.

15 Now, as I've told you previously, it's your function
16 in this case to decide the issues of fact. You are the judges
17 of the facts in this case. Your decisions on those facts
18 should be based solely on the evidence that is presented and
19 admitted here in court. Nothing that I say is evidence.
20 Nothing that any of the lawyers say is evidence. And, in
21 particular, the questions that lawyers ask are not evidence.
22 It is only the answers to the questions from the witnesses that
23 constitute evidence.

24 Objections are not evidence and testimony that may be
25 excluded is not evidence. If there is such testimony you will

C94MHIC2

1 hear me state it specifically to you, that such testimony is
2 stricken from the record and you are to disregard it.

3 The evidence will consist of sworn testimony of
4 witnesses who will be sitting here in the jury box and will be
5 testifying and exhibits that will be admitted. There will also
6 be deposition testimony. Depositions are out-of-court
7 testimony. They are testimony that is taken in a very formal
8 atmosphere, but not in the courtroom and it's under oath and
9 sworn. The individual who is being questioned must testify
10 truthfully under penalty of perjury. You are going to hear two
11 types of such testimony, such deposition testimony. You will
12 be watching a videotape of one deposition and you are also
13 going to hear read into the record a transcript of portions of
14 another deposition. That also is evidence.

15 In some instances there may be facts which the lawyers
16 agree to stipulate to which will also be evidence. Now, there
17 are two kinds of evidence in a case. There is direct evidence;
18 that is, evidence which is apparent to your senses, what you
19 can see, hear, feel, touch, and circumstantial evidence, which
20 is putting two and two together and inferring a fact from the
21 existence of other facts.

22 So, for instance, let's say that when you came into
23 the courthouse this morning it was raining. It was when I came
24 into the courthouse this morning. And let's assume that
25 everybody, as the day progresses, comes in, without umbrellas

C94MHIC2

1 and as the day goes on you realize that nobody has gotten an
2 umbrella and there is lots of people coming in and there is
3 nobody wearing a raincoat. You might infer that the rain has
4 stopped, or if it's the opposite, you come in on a sunny day
5 tomorrow and you don't see any sign of rain and people start
6 coming into the courtroom with umbrellas that are dripping wet,
7 you might infer that it's raining outside. That's
8 circumstantial evidence. It's common sense. And the law
9 treats direct evidence and circumstantial evidence equally.

10 One of the things that you are going to have to decide
11 is the credibility of the witnesses who testify. You will
12 decide how much credit to give to an individual's testimony.
13 Do you believe him or her or do you not believe him or her? Do
14 you believe part of what he or she says, all of what he or she
15 says, or none of what he or she says? That is for you to
16 decide. How do you decide the very important issue of
17 credibility? You decide it based upon your plain old common
18 sense. You use the same skills that you use in your everyday
19 life when you are talking to somebody and evaluating when you
20 are having a discussion with somebody as to whether or not you
21 think they are telling the truth. Are they being evasive? Are
22 they being straightforward? Do they look like they are hiding
23 something? Do they look like they are being truthful to you in
24 various ways? You use those skills, those common sense,
25 everyday skills to evaluate credibility. There is nothing

C94MHIC2

1 magical about it.

2 If you have friends or relatives who come to watch
3 these proceedings, please let my deputy know because it's very
4 important that you not be exposed to things that happen outside
5 of your presence. There will be times when you will be on
6 lunch break or you will be excused to go back into the jury
7 room, which is that door right there below the clock, and there
8 will be various discussions which counsel will have with the
9 Court and we will deal with evidentiary issues and other things
10 that may come up.

11 (Continued on next page)

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C94ZHIC3

1 THE COURT: Those are things which the law says that
2 the jury should not be exposed to. If you got a friend or
3 relative here, they might just say to you, without meaning to
4 do any harm, hey, did you know about X, Y or Z. We don't want
5 that to happen. We're not saying that you can't have friends
6 or relatives here, but we're saying we have to be very cautious
7 if that does occur. And we probably would have them, if they
8 were amenable, to leave the courtroom when you leave the
9 courtroom so that there would be no issues surrounding their
10 presence.

11 Now, you see these lawyers here and the plaintiff and
12 his wife. You're going to probably run into some of these
13 folks in the elevator bank. There is a single elevator bank
14 for all of you. So when you're going to go to lunch, you might
15 run into them. You might run into them in the restroom, in the
16 hallways, and they're not going to speak to you, and you're not
17 going to speak to them because I have instructed the counsel
18 not to speak to you. So don't think they're being rude.
19 Nobody's being rude. And you should not say hello. It's just
20 the way that the courtroom procedure operates. It's to prevent
21 there being, by chance, some kind of communication which
22 somebody thinks might not be appropriate. So to prevent ever
23 having to discuss that issue, we ask that they never speak to
24 you nor you speak to them, all right. So if you run into folks
25 and they sort of act like you're somebody who they've never met

C94ZHIC3

1 on the subway, then just don't even pay any attention to it.
2 That's the instruction that they're given.

3 My computer over here, which has gone dark for the
4 moment, of course in a minute, has Live Note on it. I will be
5 referring to it from time to time. live Note means I get a
6 real time feed from the Court Reporter of what's happening,
7 being said. Sometimes I have to fiddle with it because I let
8 it sit for so long that it goes dark on me. I am not surfing
9 the web, I'm not doing my e-mail, I don't do that while I'm
10 sitting in trial. It is exclusively the transcript that's
11 appearing on my screen. And that allows me, if there is an
12 objection, to go back and to look hard at the question. So
13 you'll see me looking at that. And I just wanted to explain it
14 to you so you know I'm not just spacing out and surfing Amazon
15 and trying to figure out, you know, what's new on Zappos.

16 All right, the other issue that I want to cover is
17 beverages. Some courtrooms have a rule against beverages. I
18 have no such rule. My view is whatever makes you comfortable
19 during the time that you're doing your jury service, you
20 know -- not whatever, but whatever beverage makes you
21 comfortable, bring in your beverage, all right. Because if I'm
22 going to drink coffee and if you want to drink coffee, you
23 should feel free to bring in a cup of coffee. If you want to
24 bring in a soda, you can bring in a soda. You know, you can
25 bring in whatever you want and have it back there. I've not

C94ZHIC3

1 yet had a terrible spill. I've had minor spills, but I've not
2 yet had a terrible spill. I've also had people who feel that
3 they really need to have a small snack and when I say snack,
4 I'm not talking about a bag of Doritos, but they've had like,
5 you know, a few things they've sort of just felt like they
6 really had to have in the afternoon. That's also okay so long
7 as it's discreet. And by discreet I don't mean you have to
8 hide it, you don't have to lean down and hide it be just be
9 discreet. I want you jurors to be comfortable. That's my
10 point, all right. So if there's something that we can do to
11 help make you more comfortable, let us know.

12 Final remarks on trial procedure. We're going to get
13 to the opening statements. Opening statements are not
14 evidence, okay. Remember what I said, what the lawyers say is
15 not evidence. They may be very persuasive, but it's not
16 evidence. They're going to give you an overview of what they
17 expect that you're likely to hear. That's the purpose of an
18 opening statement, is to give you a road map to the case, to
19 help you put things into context as things proceed. But it's
20 not evidence. After that you're going to hear from the
21 witnesses. That is evidence. The questions are not evidence,
22 but what you hear from the witness is evidence.

23 And then I told you that you're going to be then,
24 finally at the very end of all the evidence, hearing closing
25 arguments which are, in fact, arguments. They're also not

C94ZHIC3

1 evidence. They're arguments by the lawyers as to what
2 conclusions they think you should draw based upon the evidence
3 that was presented at this trial.

4 Let me finally end by telling you what about the
5 burden of proof. The burden of proof here on these claims is
6 preponderance of the evidence. It's different from a criminal
7 case. In a criminal case it's beyond a reasonable doubt. And
8 those of you who talked about having heard or watched some of
9 the criminal TV shows may have heard the phrase beyond a
10 reasonable doubt a lot. That is not the standard here. The
11 standard here is a civil standard, it's preponderance of the
12 evidence. What does that mean? It means more likely than not;
13 a fact or a claim must be proven to be more likely than not
14 true. Okay. So it's a lower standard than the criminal
15 standard, which is beyond a reasonable doubt. I will go
16 through that again when I instruct you on the law at the end of
17 the case, okay.

18 So my Deputy will take you into the back room, show
19 you the jury room. We'll give you a few minutes and then we'll
20 come back and go directly into opening statements. We'll take
21 a lunch break at about 12:45, and then in the afternoon we'll
22 take one break. Otherwise, we'll go till 5:00 o'clock, but
23 we'll end promptly at 5:00. Okay, take five minutes.

24 THE DEPUTY CLERK: All rise as the jury leaves.

25 THE COURT: All right, counsel, before we take our own

C94ZHIC3

1 break, is there anything that any of you would like to raise?

2 MR. HOFMANN: Just that coffee thing that you talked
3 about, does --

4 THE COURT: Yes.

5 MR. HOFMANN: -- that apply to us?

6 THE COURT: It applies to you as well. I figure if
7 I'm up here drinking coffee, which I will do, what's good for
8 the goose is good for the gander. And I will warn you about
9 those pitchers, they are dangerous. They look like they're
10 mild mannered, but they're dangerous. He's already -- you've
11 had a spill? Okay. If the government had more money we would
12 get new ones, but we don't, so. Just maybe do it on the side.
13 But let's just take then a couple of minutes. We'll do
14 openings. How long do you folks expect your openings to go?

15 MR. HOFMANN: Typically I like to keep it very short,
16 but this is so many issues, I'm thinking it's probably going to
17 be a half-hour for me.

18 MR. FORDE: If I hit 15 minutes, I'll be a lot.

19 THE COURT: All right, okay. You're welcome to turn
20 the podium during the opening, but don't waltz around too much.
21 Try to keep yourself generally tethered to the podium, and that
22 includes when you're questioning the witnesses unless you
23 approach.

24 Okay, let's take a few minutes.

25 MR. HOFMANN: Thanks. Judge, last question. May I

C94ZHIC3

1 display one of the agreed upon exhibits to the jury during my
2 opening?

3 THE COURT: If it's an agreed upon exhibit, it's going
4 to be going into evidence?

5 MR. FORDE: Yeah, it's a picture that speaks a
6 thousand words. No objection by us.

7 THE COURT: All right, no objection, you can show it.

8 (Recess)

9 (In open court; jury not present)

10 THE DEPUTY CLERK: All rise.

11 THE COURT: Let's go ahead and bring the jury in.

12 THE DEPUTY CLERK: All rise as the jury enters.

13 (Jury present)

14 THE COURT: All right, let's all be seated.

15 Ladies and gentlemen of the jury, it gets sort of cold
16 in this courtroom sometimes, and because it's the summer time
17 you may not have come with jackets and sweaters with you. If
18 you find yourself cold, let my Deputy know at a break and we'll
19 see if we can do something -- not put us to sleep, but to
20 increase the temperature, okay. We'll try to find the right
21 balance.

22 Okay, why don't we go ahead and proceed.

23 Mr. Hofmann.

24 MR. HOFMANN: Thank you, Judge Forrest.

25 Mr. Forde, counsel, Mr. Hicks, when I approach cases

C94ZHIC3A

Opening - Mr. Hofmann

1 such as this, I normally would be very brief, give a quick
2 explanation of the facts, but I think here I have to be a
3 little bit more in-depth about what you're going to learn about
4 my client during the testimony and during this case.

5 So this is Charles Hicks. He's a Jersey boy, hard
6 working man, always worked with his hands. He's now 61 years
7 old. He had many professions over the years, but his primary
8 one was working in the Maritime industry, the tugboat industry,
9 tugboat captain, master of tug boats. What are tug boats?
10 You're going to learn a lot about tug boats during this trial.
11 It will be kind of interesting. Tug boats are work boats.
12 They move ships, they move barges, they move scows. It's the
13 engine that moves other vessels that do work.

14 Back in the 1990s, Charlie was a tugboat man, and
15 worked at many jobs. He had an injury. He had eventually left
16 the tugboat industry, went into the construction field.
17 Unfortunately, you'll find he had another accident, very
18 serious injuries.

19 But the one thing that you will find is, despite the
20 fact that he became injured, he always wanted to get back to
21 work. And that is one of the things that generates some of the
22 issues that become -- that are involved in this case that
23 you're going to be deciding.

24 In the mid 2000's, around 2003, Charlie decided to
25 return to working in the tugboat industry. He took a bunch of

C94ZHIC3A

Opening - Mr. Hofmann

1 jobs through several unions that referred him work. And he
2 decided that because he needed to improve and advance, he had
3 to get or renew his mate's and captain's license. And you'll
4 find out that by 2008 he had gone through Maritime school, he
5 had worked, had taken the tests from the United States Coast
6 Guard, and he got certified as a licensed tugboat captain.

7 He applied for work with the company known as Vane
8 Line Bunkering. And they're the defendant in this case. The
9 company out of Philadelphia that they have a bunch of tugboats
10 and barges, and they primarily move petroleum products.

11 He went through a rigorous physical examination before
12 he started working for Vane Line and he passed it.

13 He then was given a two week period where he was
14 evaluated by Vane Line supervisory personnel, and he was given
15 glowing recommendations and assigned to a vessel as a mate.
16 And the vessel is the Tug Patriot. I got a picture of it here,
17 I'll show it to you in a minute. This was the dream come true
18 for Charlie, because he was now in a position where he had been
19 working steady for good money. You'll see that he was making
20 over \$400 a day. He would be work two weeks on, two weeks off.
21 He was one of the five main crew members on the tugboat.
22 There's captain, there's a mate, there's an engineer and two
23 deck hands, and this was his dream come true. Charlie's, like
24 I said, from the old school, you do things by the rules, you do
25 things correctly.

C94ZHIC3A

Opening - Mr. Hofmann

1 He was working on April 21st, 2009, moving an oil
2 barge called the VB-53, big three, 400-foot long vessel, by
3 using the Tug Patriot, his boat. And they were coming into or
4 close to the Chesapeake Bay coming down from the James River.
5 And we'll show you some charts just to get you oriented. And
6 they had to change over from pushing the barge in what's known
7 as a notch, to towing the barge on a cable that extends off the
8 back of the boat. Now, he's the mate at the time that this
9 change over is occurring, so he directs his deck hands, who are
10 the primary grunt workers on the vessel, to change over from
11 the towing cables that were connected to the notch of the barge
12 that they're pushing, and connect the tow wire to the cables
13 that come, and chains that come off the front of the barge, and
14 they connect them.

15 Now he turns the boat and gets ready to proceed
16 forward. Now, the workers work, you'll see, six hours on, six
17 hours off. The mate operates the tugboat from the hours of
18 12:00 noon till 6:00 in the evening, and from 12:00 midnight to
19 6:00 in the morning. The captain works the other 12 hours of
20 the day. The boat works 24 hours a day.

21 This incident happened during the mate's watch when,
22 in the afternoon, when Charles was in charge, but before the
23 captain went to bed. At the end of his 6:00 in the morning to
24 12:00 watch, he said to Charles, I want you to get me up
25 because I want to assist in doing this change over of the

C94ZHIC3A

Opening - Mr. Hofmann

1 barge. You're going to be going out into the Chesapeake Bay,
2 we got to put it on the wire, I'm new to the boat and I want to
3 get some practice doing it, I want to be involved in it. So
4 Charles does get the captain up, and they proceed together to
5 the back of the boat. And here's a picture of the Tug Patriot.
6 The two of them proceed back to this little work station. This
7 is a control station up here, it's called the dog house, where
8 you can see all of the work that's going on.

9 Now this big thing here, that's a towing winch, it's
10 got a drum, and this is the big wire that comes off the back of
11 the boat, and that runs to the front of the barge and it tows
12 it. The captain comes over to that control station where
13 Charles is and says, Charles, you've not put out enough cable,
14 I want more cable put out. Charles wants to discuss it, but
15 says, listen, he's the captain, I do what he says.

16 Now, as you can see, and it's curious, you see how
17 this cable is coming down here. It comes over this steel bar.
18 This steel bar they call a Texas bar or a towing bar. And the
19 wire is held up off of the back of the boat so it doesn't chafe
20 on the back of the boat, but of course it would chafe on this
21 Texas bar. So they have a device, it's called a donut. And
22 you can see it sort of sitting over here on the side. It's a
23 round spool. It's called a shiv. And the wire sits in that
24 spool and it can roll and, it's greased so it doesn't chafe and
25 break.

C94ZHIC3A

Opening - Mr. Hofmann

1 When Charles first set up the boat, you're going to
2 find, on this day when they're setting up the tow, the wire was
3 in the donut properly. But then captain Comiskey, Bruce
4 Comiskey comes out and says, Charles, I want more wire put out.
5 And the captain proceeds to put out more wire. In so doing,
6 the wire comes back out of this donut and the donut falls over
7 to the side.

8 Now, there's a company rule that says, at all times
9 when towing, you're to have this wire in that donut. Why?
10 These wires are very expensive. In fact, defendants will put
11 on a deposition of an expert who concedes these wires are very
12 expensive. You lose a wire, you break the wire, you have all
13 kinds of problems. First the tow could go all over the place,
14 and if you're in close quarters, that's a bad thing. Of course
15 the wire itself would have to be replaced, and that's an
16 expense.

17 So now they have a method, you're going to find, of
18 just taking the boat, and if you turn it this way the wire
19 would lead back to the other side, and it can catch the donut.
20 And if you turn the boat back, the wire slides back up the rail
21 with the donut and it sits in. And that's the typical way of
22 catching the donut, they call it.

23 On this day, Captain Comiskey took over controls, and
24 probably because he was new to the boat, he couldn't get that
25 wire into the donut. Now, as I said, there's a rule that says

C94ZHIC3A

Opening - Mr. Hofmann

1 you have to have the wire in the donut if you're going to tow,
2 and Captain Comiskey's having difficulty. So Charles, who is
3 the mate, says, listen, I'll go down there and I'll push this
4 donut up the bar, intending to having the help from either the
5 engineer who is out on the deck or his deck hand, so that the
6 captain could lay this wire into the donut. So he goes down on
7 the deck. He sees one of the deck hands and says, come on,
8 give me a hand. Now this deck hand whose name is Scroggins, is
9 deathly afraid of being anywhere near the wire when it's out.
10 And he says, no, and he walks away. And you'll find that he
11 was with another deck hand, who will testify here, he'll be
12 here tomorrow Vin Lusardi. And Mr. Lusardi says, yes, I saw
13 that the wire was out of the donut on this day, I saw them
14 trying to manipulate it, but we went for it and he went into
15 the galley. He doesn't recall Charles coming down, probably
16 because they went forward and Mr. Hicks had his communication
17 with Mr. Scroggins, who said I'm not helping.

18 Also out there was the engineer. And it's typical for
19 the engineer to help with deck work. And it's typical, and
20 even Mr. Lusardi will tell you, it's typical for the engineer
21 to be out there when they're making up the tow, because there's
22 mechanical equipment involved and that's the engineer's job.

23 Now, Charles says to the engineer, you'll find --
24 he'll so testify -- that, here, give me a hand. And the
25 engineer says, look, I've been told by the captain not to get

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Opening - Mr. Hofmann

1 involved with handling the wire. So Charlie's left with a
2 dilemma. They're going to be towing this over a tunnel near
3 Newport News, they're going to be in a narrow channel, and the
4 wire's not in the donut. So Charles -- and it's all conceded
5 by everybody, this is a two man job if you're going to do it
6 manually -- Charlie tries doing it by himself because nobody
7 would help. The captain wants it done. The captain's looking
8 down and let's him do it. Charlie pushes up the donut on the
9 cable. Unfortunately, this donut weighs 200 some odd pounds,
10 and he tears up his shoulder.

11 Now, there's going to be testimony by Mr. Comiskey, if
12 he comes in tomorrow as expected, he's going to say, I know
13 nothing. You're going to find that he does all this. I don't
14 remember anything.

15 There may be testimony read to you by the engineer
16 Mark Johnson, I don't remember anything. Well, these are guys
17 that are still working for the company.

18 Now, we know from other circumstantial evidence -- you
19 remember the judge mentioned circumstantial -- we're going to
20 show you circumstantial evidence that shows that these people
21 were there and knew about what Mr. Hicks was doing by himself.
22 And you're going to judge. You're going to have Mr. Hicks
23 telling you the story, and you're going to have these others,
24 who are going to have some very shady and shaky recollections.
25 And there will be some documentary evidence, some statements

C94ZHIC3A

Opening - Mr. Hofmann

1 that Mr. Hicks provided to the company as part of the company's
2 investigation, which corroborate everything Mr. Hicks says.
3 And you're going to find that the company's investigation --
4 which should have been done thoroughly, talking to all the
5 witnesses -- was never done.

6 All right, so what happened to Mr. Hicks? I said he
7 tore up his shoulder. To be a little more technical, got a
8 student here, he has what's known as a torn labrum and a torn
9 rotator cuff from this accident.

10 He gets treatment. He goes to a Dr. Lisser, who
11 apparently will be here to testify tomorrow. And there's
12 intervening things going on, but he goes to a Dr. Lisser who
13 does a surgery to repair the rotator cuff and the labrum. And
14 from the evidence, we'll even concede that surgery went well,
15 it was a good surgery.

16 So what's done next when you've had a severe shoulder
17 injury such as this, you start doing physical therapy, and
18 Charlie's partook of that.

19 Unfortunately, and we're going to have testimony from
20 a different doctor, a Dr. Charles Rizzo -- and I'll explain how
21 this comes about in a minute -- who says that, in his opinion,
22 what happened was during the physical therapy -- and it's not
23 common, but it occurs frequently -- you can have a retear in
24 the shoulder, and Charles has a retear. And there's going to
25 be MRI evidence and medical testimony. All of this sounds

C94ZHIC3A

Opening - Mr. Hofmann

1 like, hey, this is a case that should easily get resolved. Why
2 are we doing all this, what happened, why is this so complex?
3 It doesn't sound that difficult.

4 Well, here it goes. In the Maritime law the employer
5 is required to provide what's known as maintenance and cure.
6 And the Judge is going to teach you all about that later. But
7 this is a benefit, you're going to find, that provides a living
8 amount of money to help pay your food and lodging, and also to
9 pay your medical bills.

10 Now, Charles comes and is being treated at the
11 company's expense by Dr. Lisser who did the surgery and
12 prescribed the physical therapy, but Charles is working at
13 getting better. But he's falling behind, behind, behind in his
14 house payments, his home payments. He's got three sons, two
15 living with him, one in college. He's got a wife. They have a
16 beautiful home down in Middletown, New Jersey, and their
17 mortgage, utilities, outstripped the \$15 a day that the company
18 was paying. So Charles has to do what any provider does. He
19 has to go and look for additional work. And there's nothing
20 wrong with working while receiving this maintenance and cure if
21 you can't make your bills, and he did so. And over the course
22 of the next -- well, he had surgery on July 1st.

23 He goes to see Dr. Lisser in October, sees him in
24 November, sees him in December, sees him in January, and he's
25 not getting better. And, as I said, Dr. Rizzo will testify

C94ZHIC3A

Opening - Mr. Hofmann

1 what happened was he had a recurrent tear doing his exercise.
2 And the way he did the exercises, you'll find, is there's this
3 device, it's a theraband and you do exercises with it and you
4 connect -- you wrap it around a pole and you do different
5 exercise. And Charles is going to tell you that's what he was
6 doing.

7 Well, comes the spring of 2010, Charles still has his
8 house. He can't afford to hire people to do everything. He
9 does light work around his house. He's been told he can do
10 things within his capacity. He decides to, on a beautiful
11 spring day, to plant a shrub in his yard. You'll find that he
12 has this son dig the hole for it. It's a little Christmas
13 tree. And he and his grandson work on putting the tree in.
14 And Charles does some shoveling, some kind of motions that he's
15 doing in exercise. Well, this company surreptitiously sent an
16 investigator who sat in some truck or some car and filmed this.
17 And they took this video of him doing motions that he was
18 perfectly capable doing, because he'd been doing this exercise
19 for seven months, and they took it to his doctor, Dr. Lisser
20 and said, look at this. And then they give Dr. Lisser an
21 explanation of what they wanted Dr. Lisser to believe were the
22 physical capacities of a mate on a boat. And Dr. Lisser sees
23 this and says, oh, this guy's reached maximum medical
24 improvement. They don't tell -- you're going to find they
25 don't tell Dr. Lisser that Mr. Hicks in his job has to carry

C94ZHIC3A

Opening - Mr. Hofmann

1 60, 70-pound weights, has to climb 30-foot ladders, work
2 overhead. And I'm sure Dr. Lisser, when he testifies, is going
3 to concede that Mr. Hicks' biggest problem is working overhead
4 and lifting.

5 Now, we're going to have that surveillance video for
6 you and you'll be able to watch all 25 minutes of him putting
7 in this shrub. And you won't see one second where he raises
8 his hand overhead. Because he can't because of the injury,
9 because of the torn rotator cuff he now has.

10 So what does this do? Vane Line cuts him out of
11 maintenance and cure so he can't get any further medical care,
12 even though Dr. Lisser on April 26, before he saw this video,
13 said this man needs an MRI because there's something going on
14 here and it's not improving.

15 So this is now in April that Dr. Lisser says he needs
16 an MRI. June comes along. He sees this video and cuts him
17 off, leaves Mr. Hicks completely alone. Vane Line cuts him off
18 says you're fit for duty, when we know he's not. Now, you're
19 going to hear a lot of evidence about the work that tugboat men
20 have to do. Whether you're a mate, or a deck hand, there is a
21 lot of heavy physical work. You can even see on this, these
22 are ladders. These are the ladders they have to climb to go
23 from the tug to the barge. Here's an almost straight up ladder
24 to get up to the this upper wheel house. You can't do that
25 with this kind of shoulder he currently has.

C94ZHIC3A

Opening - Mr. Hofmann

1 All right. Let's get back to the donut. As I said,
2 the company has a rule that requires it to be carried, the
3 wire, in the donut. They failed to have that done that day, so
4 Charlie was trying to comply with the company rule. There is
5 the rule that I said that you're going to find out about
6 maintenance and cure that they're supposed to cure him. They
7 didn't. These are the issues that get us here.

8 Now, there are some things that men and women will do
9 when their lives are threatened, their home and health are
10 threatened. And maybe they're not proud of it. And you're
11 going to find that Charles' house was put into foreclosure, and
12 he and his wife Janet were desperate. So Charles does start
13 working, and he works quite a bit. And he applies to companies
14 in the tow boat industry with his license. And he doesn't tell
15 them the particulars about this accident. He doesn't tell them
16 that he has an injured shoulder, because he needs to work and
17 earn money and. You're going to find he earned some fairly
18 good money in 2010, and 2011. You're going to judge his
19 credibility. He didn't tell the truth, and he will tell you up
20 there why, what he was going to do? He was desperate. But
21 you'll have to judge his credibility about everything. Because
22 I'm sure Mr. Forde is going to say, he admits he lied about
23 this, so he must be lying about everything. Ladies and
24 gentlemen, that's going to be your job to judge that
25 credibility.

C94ZHIC3A

Opening - Mr. Hofmann

1 So what are we -- what are the things that we intend
2 to prove to you? Well, this case is about money, to a certain
3 extent. It's about justice, to a certain extent. We're going
4 to prove what Mr. Hicks could've been earning if he had been
5 able to continue, hadn't been injured. And it's a fairly
6 substantial amount of money he would make from Vane. We're not
7 claiming that Charles will never go back to work again. All
8 we're claiming here is they have an obligation to provide him
9 that cure to get him the surgery, pay for that surgery so he
10 can get back to work, which is you'll find is what he wants to
11 do.

12 We're going to be making a claim for, here, for the
13 pain and suffering he's gone through. That's going to be a
14 judgment for you.

15 We're also making a claim for the failure to pay a
16 reasonable amount of maintenance and cure. He owned a home.
17 They knew that. He had utilities. They know that, but they
18 were paying him \$15 a day, rather than a reasonable amount.
19 And we will show you what that reasonable amount should be.

20 So in a nutshell, and I'm sorry it took as long as I
21 did, but I needed to bring these issues out so you understand
22 what this case is about, and what we're intending to prove to
23 you.

24 So thank you, and I hope you pay attention to all the
25 evidence that's adduced before you make your decision. Thank

C94ZHIC3A

Opening - Mr. Hofmann

1 you.

2 THE COURT: All right.

3 Mr. Forde.

4 MR. FORDE: Ladies and gentlemen of the jury, thank
5 you. Fortunately, this is going to be a relatively short
6 trial, we hope. And I would like to just start this off with
7 that Vane bent over backwards for this guy. They paid him his
8 full salary, even when they didn't have to, for over three
9 months. They got him -- the doctor that operated on him was
10 the doctor that plaintiff had chosen himself. This is Dr.
11 Lisser. Dr. Lisser is the one that went and looked, after
12 looking at all his evidence, his records, and then saw this
13 video, he was hurt. You're going to have testimony from Dr.
14 Lisser saying this guy was taking advantage of the system.

15 And you're also going to get additional situation,
16 he's the only one that witnessed his own accident. Nobody else
17 did on the vessel. The first time the captain learned about
18 this was when Mr. Hicks came in and wrote down on his discharge
19 thing, I hurt my shoulder. And captain goes, oh, come on, you
20 know you're supposed to tell us right away, now you got to fill
21 out the incident report. Don't worry about it, don't worry
22 about it, everything's fine, everything's fine, I'll go see my
23 own doctor. And that's why there wasn't any formal
24 investigation. Because the next thing we know we got a letter
25 from the attorney, he's going that route. So we have that

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Opening - Mr. Forde

1 going.

2 This is a case where there's going to be some serious
3 credibility issues regarding the plaintiff; how the plaintiff
4 got hurt, and whether the plaintiff actually got hurt the way
5 he describes it. Specifically, you're going to have to decide
6 whether the plaintiff is telling the truth, because no one else
7 witnessed it. He's claiming that the captain ordered him to
8 move the 200-pound piece of equipment. Frankly, it's hogwash.
9 The evidence is going to show you that that's not the case. In
10 fact, at the time of the incident, they were towing close
11 quarters sea by land, that's what they call it, and they were
12 towing short, short wire, which depending on how short the wire
13 is, the tow bar doesn't even get involved because of the angle.
14 Added to that, he was towing a light barge.

15 Now what happens is when you load the barge, you are
16 able to look out on the Hudson River, you actually see those
17 guys that are kind of like, are they really floating, it's just
18 about like two or three feet of the boat you can see, that's
19 generally a loaded barge.

20 This was a light barge. This was like 40 feet up in
21 the air, and had maybe drawing a draft of maybe 2 feet, 3 feet.
22 It was an empty barge.

23 So you're at close quarters. You would never, ever
24 put out extra line in that area because the longer the line is,
25 the less control you have of the barge. They were going over a

C94ZHIC3A

Opening - Mr. Forde

1 tunnel area, allegedly. In that particular case, you need on
2 short wire.

3 And, lastly, and this is a really important thing,
4 safety. Humans come first. Vane would never ever tell
5 somebody while the line, the towline is out, to go to the Texas
6 bar and manhandle that donut. A line just a cost a few
7 bucks -- maybe it's an expensive few bucks, but there is
8 insurance on these things. You got pulling machinery. The tow
9 wire snapped, you make the claim. Humans first.

10 And you're going to get testimony from the captain and
11 actually everybody, aside from him, that basically say, look,
12 thou shalt not go behind the tow winch in this area while there
13 is a wire out. You leave it. If you're in close quarters and
14 it's out of the donut -- as a matter of fact in this picture
15 it's out of the donut -- you just leave it.

16 And, frankly, in conclusion, I think the evidence is
17 going to show that Vane did nothing wrong. They bent over
18 backwards to make sure that he was well cared for. But you got
19 to remember something, that like the tugboat workers and the
20 crew members that are out there, the tugboat industry is a very
21 close knit society. There is -- you've got McAllister out
22 here, family owned for over 100 years, you've got Bouchard
23 around here that's over 100 years in the area. And what they
24 do -- and this is how we found out about it, that he was
25 working for another tugboat company called Dan Towing in

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Opening - Mr. Forde

1 October of 2011. And the evidence will show that he actually
2 had a physical there -- he applied for the job, he got a
3 physical, and he got a fit for duty to work on Dan. And lo and
4 behold, two weeks into it he falls and he hurts his shoulder.
5 And, interestingly enough, the evidence is also going to show
6 there's this similar cast of characters that are involved in
7 that second claim, which is not yet a lawsuit because, well,
8 they got to get this one done first.

9 I have nothing further. Thank you.

10 THE COURT: All right, thank you, Mr. Forde.

11 Okay, Mr. Hofmann, would you like to call your first
12 witness?

13 MR. HOFMANN: Yes, your Honor. We will call
14 Mr. Hicks.

15 THE COURT: Great. Just take this picture, move it
16 away so I can get a full line of sight there.

17 CIRO CHARLES HICKS,

18 called as a witness by the plaintiff,

19 having been duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. HOFMANN:

22 THE COURT: All right, please be seated, Mr. Hicks.
23 And it'll be very important for you to speak into the mic
24 close, but not too close. And there's water. And it is, as
25 with the other pitchers, a little booby trapped, so just be

C94ZHIC3A

Hicks - direct

1 very careful with it. It's booby trapped, yes. Serious issue
2 that we have.

3 Okay, you may proceed, Mr. Hofmann.

4 MR. HOFMANN: Thank you, your Honor.

5 Q. Good morning, Mr. Hicks.

6 A. Good morning.

7 Q. Can you tell us your address, please?

8 A. 5 Chanowich Court, Middletown, New Jersey.

9 Q. And is that a, what kind of house, what kind of home is
10 that?

11 A. Single family residential.

12 Q. And how long have you lived there?

13 A. 26 years.

14 Q. And do you own that single family home?

15 A. Yes.

16 Q. And with whom do you live?

17 A. My wife Janet and my two sons, Steven and Scott.

18 Q. How old is Steven?

19 A. Steven is 30.

20 Q. And how old is Scott?

21 A. 28.

22 Q. Does your wife work outside of the home?

23 A. No, she doesn't.

24 Q. And during the five years before the incident in April of
25 2009, was she working outside of the house?

C94ZHIC3A

Hicks - direct

1 A. No.

2 Q. Now, can you tell the jury what is your profession, how do
3 you make your living?

4 A. I'm working on the tug as licensed captain.

5 Q. And for how long in total have you worked in the tugboat
6 field?

7 A. Roughly 35 years.

8 Q. Have you worked in other fields during that 35 year period?

9 A. Well, construction, working in construction.

10 Q. Now, you said you have your license. Can you tell us
11 licensed by whom and to do what?

12 A. I have a 200 ton master of tow and -- to work on a tugboat
13 to operate it as master.

14 Q. Who issues that license?

15 A. United States Coast Guard.

16 Q. Is it required licensing in order to tow barges of carrying
17 petroleum?

18 A. Yes, it is.

19 Q. When did you first get your tugboat masters license?

20 A. The first time around or the second time?

21 Q. Just tell us when you first got your license?

22 A. Originally back in 1974.

23 Q. And did there come a time when it lapsed?

24 A. Yes, it did.

25 Q. And when did you renew your license?

C94ZHIC3A

Hicks - direct

1 A. Back in 2008, February of 2008.

2 Q. And was there a need for that license when you were working
3 in the tow boat industry for that first for the first part of
4 that 35 year period?

5 A. Yes, there was. You had to have a license, but then also
6 you could work on 20, 25-foot tug boats without a license.

7 Q. And were you working on that type of boat?

8 A. Yes, I was.

9 Q. Tell us what your Maritime tugboat experience in general
10 was over that period of time?

11 A. I originally started working for Reinauer in 1972 as a deck
12 hand, and we were towing oil barges up and down the coast, also
13 to Boston. And we also towed some sand scows. We did some
14 ship work.

15 Then I transferred over to McAllister Brothers when I
16 got my first shot to be able to steer, because at that time
17 they had the garbage run, and that was called a crash, boom
18 bank. They didn't care, because they were extremely heavily
19 built. So that's where you got your main experience in
20 steering.

21 Q. And what did you do after you worked for those couple
22 companies?

23 A. Well, I worked for McAllister. I did oil barges also, and
24 then I started training and doing ship work, docking ships,
25 pulling them off docks, putting them into port, turning them.

C94ZHIC3A

Hicks - direct

1 And then I went the to work for Moran doing ship work,
2 and also the garbage run at that time. They had the contract
3 of it.

4 Q. Did you also do construction barge work?

5 A. Yes, I did. We did some dock building, and we needed a tug
6 and a small barge to push material and be able to get out to
7 some of the docks that we were doing.

8 Q. So was there a period of time in the 1990s that you were
9 not working in the tugboat industry?

10 A. Yes, it was a period in the '90s.

11 Q. And what you were doing then?

12 A. I was doing strictly heavy construction.

13 Q. Had your own business?

14 A. Yes, I did.

15 Q. So did there come a time around 2003 or so that you started
16 to return to the tugboat industry?

17 A. Yes. I started to go back to school and training and
18 stuff. Because I went to the Coast Guard and they wouldn't
19 give me my original license back without retesting again.

20 Q. Did you, between -- let's just do the period between 2003
21 and 2008, for whom did you work during that period?

22 A. I worked for K.T. Marine Coastline Towing, McAllister,
23 Village Dock, Avanti.

24 Q. Were you getting some of that work through union referrals?

25 A. Yes, Local 25.

C94ZHIC3A

Hicks - direct

1 Q. And what is Local 25?

2 A. It's the dredge men's union.

3 Q. Now, you said that around 2008 I believe you said you
4 renewed your license or you got your license again?

5 A. Yes. I was able to get my license back in February of
6 2008.

7 Q. What did you have to do, what were the steps you had to do
8 to get your license in 2008?

9 A. I had to go back to -- they wanted me to take a class again
10 to get all the, all the updated rules of the road, take the
11 test for that. I passed that.

12 Deck general test, they wanted. Also radar, what they
13 call maneuvering, which was doing anchoring, towing, stuff.
14 You had to also do -- take a test on that, your knowledge of
15 that, and then also a practical test doing that.

16 Q. Did you have a plan or a goal when you got that license as
17 to what you wanted to do with it?

18 A. Well, I wanted to stay in the tugboat industry. I always
19 did love it right from the day I started with it. My goal was
20 to go on and get higher and higher with it and stay with it.

21 Q. Okay. Let's talk a little bit about the work of a tugboat.
22 What, in general, do tugboats do?

23 A. We generally we -- do if you're an oil company, you tow oil
24 barges. You can push them, take them on the hip. You can tow
25 them on a wire. You do ship work, sand work, scow work,

C94ZHIC3A

Hicks - direct

1 construction equipment, towing cranes around, towing material
2 that has to go for -- when they're building a bridge or
3 something, you're towing large concrete objects that are
4 extremely delicate that have to go in the Sandy Hook. I don't
5 know if anyone's ever been that way, the prefab bridges they
6 built, did that. Quite a bit of stuff in that.

7 Q. What is the general compliment of crew on a working
8 tugboat?

9 A. You have a captain, a mate, two deck hands and an engineer.

10 Q. And what are the general -- do tugboats generally work 24
11 hours a day?

12 A. Yes, you do.

13 Q. And what are the watching, watches that the workers work?

14 A. The captain works the morning watches, 6:00 in the morning
15 to 12:00 noon, and 6:00 in the evening to midnight. Then the
16 mate takes over, which is called the second watch from midnight
17 to 6:00 in the morning, and then from noon to 6:00 in the
18 evening.

19 Q. Now, I think you mentioned, and just so that the jury
20 understands some of work that has to be done, you mentioned
21 three different means of moving barges, is that right?

22 A. Yes, sir.

23 Q. All right, what are those three main means?

24 A. Well, you can push a barge from behind, and what they call
25 a notch vessels where you get into it, and you put up a set of

C94ZHIC3A

Hicks - direct

1 cables and you're able to push the vessel that you're pushing a
2 barge. It's easier to control, much -- easy to handle through
3 tight quarters.

4 The other way is on what they call alongside. You're
5 using rope to put up a strap, a bow line and the stern line.

6 The 3rd way is tow on a wire. You would hookup a tow
7 wire to a set of bridles, hook it together, and you could also
8 tow like that.

9 MR. HOFMANN: If I may approach, your Honor?

10 THE COURT: You may.

11 Q. Mr. Hicks, I'd like you to take a look first at plaintiff's
12 trial exhibit 60 and trial Exhibit 4, And explain which of
13 these three methods may be described in those photographs?

14 A. Well, 60 is a push mode through the notch.

15 Q. Show the jury.

16 THE COURT: Well, you've got to, before you publish it
17 to the jury, you need to get it admitted.

18 MR. HOFMANN: All right. Your Honor, may I offer
19 plaintiff's exhibit --

20 THE COURT: 4 and 60?

21 MR. HOFMANN: -- 4 and 60?

22 THE COURT: All right.

23 MR. FORDE: No objection.

24 THE COURT: All right, so plaintiff's Exhibit 4 and
25 plaintiff's exhibit 60 are admitted.

C94ZHIC3A

Hicks - direct

1 (Plaintiff's Exhibits 4 and 60 received in evidence)

2 THE COURT: Now you can have him show it to the jury.

3 MR. HOFMANN: Yes, your Honor. Thank you. I'm sorry.

4 Q. Just hold it up and show the jury what we've got.

5 A. 60 is what they call a push mode, what they call getting it
6 in a notch. That's how you would push. This obviously is a
7 light barge, but that's how you would push it.

8 This is also light barge and a push mode with the --
9 as you notice here, there is a set of cables running out from
10 the stern to the bow connected to the barge. That's how you
11 are able to maneuver and control it.

12 Q. Now, if you would then take a look at plaintiff's trial
13 exhibit 56.

14 MR. HOFMANN: Your Honor, I offer that in evidence
15 before he discusses it?

16 THE COURT: All right. Any objection to 56?

17 MR. FORDE: No, your Honor.

18 THE COURT: All right, Plaintiff's Exhibit 56
19 admitted.

20 (Plaintiff's Exhibit 56 received in evidence)

21 A. This is a vessel, what they call alongside, whereas you
22 notice there's a trying to -- you see here there is a bow line
23 and a strap, and there's also a stern line, which you obviously
24 can't see on this photo -- actually, yes, you can, it's right
25 back in here. This is what they call alongside on the hip.

C94ZHIC3A

Hicks - direct

1 Q. On the hip?

2 A. Yeah. The other terminology is on the hip. But this is
3 alongside, push towing it.

4 Q. And how does the tugboat move the barge that's shown in
5 that photograph.

6 A. In this one?

7 Q. Yeah -- no, the one that you have. Just tell the jury
8 how -- what does the tugboat do?

9 A. What he's doing is he's pushing the barge alongside
10 traveling down the river, and he's able to control it wherever
11 he has to -- the reason he has it on this is because he's
12 obviously going into an area that he has to be able to release
13 it and do what he has to do.

14 Q. Okay. Now if you would --

15 MR. HOFMANN: At first, your Honor, I'll offer exhibit
16 58.

17 THE COURT: Any objection?

18 MR. FORDE: No objection, your Honor.

19 THE COURT: All right, plaintiff's exhibit 58
20 admitted.

21 (Plaintiff's Exhibits 58 received in evidence)

22 Q. If you would explain, Mr. Hicks, what is shown in exhibit
23 58?

24 A. You have the tug is hooked up to a barge. And this is
25 towing from behind. And he's hooked up to a set of bridles

C94ZHIC3A

Hicks - direct

1 here. As you can see chain, heavy bridles, and there's a cable
2 running from the stern of the tug to the bridles, which I guess
3 you can see that.

4 (Continued on next page)

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C94MHIC4

Hicks - direct

1 Q. What do you mean by a bridle?

2 A. A bridle is two heavy -- it could be either two heavy
3 chains or two heavy cables which are permanently usually on a
4 bow of the barge. Whereas when the tug comes along side, he
5 hooks up to it and is able to connect the large shackle to it
6 and tie off on it. That's what they call a set of bridles.
7 It's actually pulling cables, as you would.

8 MR. HOFMANN: Your Honor, if we could, with your
9 permission, pass those photos around.

10 THE COURT: You may.

11 Mr. Hofmann, why don't you go ahead and proceed while
12 the jury --

13 MR. HOFMANN: I didn't know if you wanted me to, your
14 Honor.

15 Q. Mr. Hicks, these barges appear to have cables that are
16 rather large, is that right?

17 A. Correct.

18 Q. Describe the equipment, size and shape and how it's moved
19 that connects all these tugs to these barges.

20 A. The cable on the stern of a tug on a winch, which is the
21 towing machine that he showed you, could be as large as two and
22 a half, could be also as small as two. It's a large cable that
23 you let out to tow the vessel that you are towing, which is the
24 barge. There is also heavy-duty chains that they use, which
25 you can see on that one photo there, it's a huge chain. It's

C94MHIC4

Hicks - direct

1 in a shackle that's on there that is approximately about this
2 big. It could weigh upward of 120 pounds. The gear that is on
3 the tug is extremely heavy, which is obviously to sea, and it
4 has to be high-grade steel. You have to hook it all up and set
5 it up and be able to tow it and hold it.

6 Q. In general, on a tug boat, who primarily does the
7 manhandling, the heavy work?

8 A. The deckhands do it and also the maid has to pitch in
9 sometimes and the captain also has to pitch in, depending on
10 what we are doing.

11 Q. Now, there came a time, I believe, that you applied for
12 work with a company called Vane Line Bunkering, company
13 involved in this case, is that right?

14 A. Yes, sir.

15 Q. When was that?

16 A. That was in September of 2008.

17 Q. And what sort of business is Vane Line Bunkering?

18 A. They are strictly in the oil business. They do bunkering
19 to ships, which is bringing a barge out with fuel on it to
20 power the ship so the ship can -- like gas in a car.

21 Q. What type of vessels does Vane Line operate?

22 A. Barges and tugs.

23 Q. Where are they located?

24 A. In Baltimore, Maryland.

25 Q. And in 2008, you said you applied for -- what position did

C94MHIC4

Hicks - direct

1 you apply for?

2 A. I had applied for a captain or maids position.

3 Q. Were you invited to perhaps join that company if you passed
4 certain tests?

5 A. Yes.

6 Q. What tests did you have to pass in order to be offered a
7 job at Vane Line?

8 A. I had to be able to climb ladders vertically, I had to be
9 able to crawl through tunnels, I had to be able to take 30
10 pounds of weight and put it up eye level on a shelf. You had
11 to do that consecutively three times. You also had to be able
12 to crawl through a 24-inch tunnel, come out, go down into a
13 hole and then come around and come out the other side and go
14 down four or five steps at that point. Then you also had to
15 pull a sled, which was deadman weight of about 150 pounds, and
16 you had to run it across probably the length of this courtroom.
17 You had to do that five times. You had to go up, down, up,
18 down with your arms, and you are able to pull it.

19 Q. This was a physical exam, you are talking about?

20 A. Yes, sir.

21 Q. Who administered this physical exam?

22 A. Concentra.

23 Q. Concentra?

24 A. Yes, sir.

25 MR. HOFMANN: Your Honor, I offer Trial Exhibit 15,

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Hicks - direct

1 records of Concentra Medical.

2 THE COURT: Any objection?

3 MR. FORDE: No objection, your Honor.

4 THE COURT: Plaintiff's Exhibit 15 admitted.

5 (Plaintiff's Exhibit 15 received in evidence)

6 Q. Mr. Hicks, did Concentra have you do this physical
7 examination according to the standards that Vane Line had asked
8 them have you do?

9 A. Yes.

10 Q. After you did the physical exam, were you then given an
11 evaluation period where you worked with Vane to be evaluated to
12 determine whether you were competent to work on their boats?

13 A. Yes.

14 Q. Describe what you did for them in that evaluation.

15 A. They put me on the tug Endeavor, my first tour for two
16 weeks. I had to control and operate the vessel, I had to put
17 it on the tow wire. I also had to put in push mode, handle it,
18 docking it, taking it out of a dock, and I had to do that -- I
19 was there for two weeks, so I did it, I would say, probably
20 about four times, roughly.

21 Q. Did you have to do any physical tasks involved?

22 A. I also had to go down and help on a deck to show that I
23 knew the correct procedure to hook up a barge with the cable in
24 case a deckhand wasn't familiar with it. The maid or the
25 captain is responsible to go down and show them the safe way to

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Hicks - direct

1 hook up everything.

2 Q. Did you have to do any part of your evaluation while you
3 were actually up on the barge?

4 A. Yes. You also had to be able to go up on a barge, climb up
5 there, talk to -- you're in a supervisory position where you
6 have to go up and talk to the bargeman, find out what time they
7 are going to be finished so you can notify the company. You
8 also have to talk to the dock sometimes. There could be a port
9 captain up there or dock bargeman and stuff like that.

10 Q. Do you know who Captain Dennis J. Kozu is?

11 A. Yes.

12 Q. Who is?

13 A. He was placed on the tug Patriot. He's a captain there.

14 Q. Dennis Kozu?

15 A. No. Dennis Kozu. Excuse me. He is the head port captain
16 in Philadelphia.

17 Q. Did he do your evaluations?

18 A. Yes, did he.

19 Q. Did you pass the evaluations by Dennis Kozu?

20 A. Yes, sir.

21 MR. HOFMANN: Your Honor, I offer Exhibits 27 and 28.

22 THE COURT: Any objection?

23 MR. FORDE: No, your Honor.

24 THE COURT: Plaintiff's Exhibit 27 and Plaintiff's
25 Exhibit 28 admitted.

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Hicks - direct

(Plaintiff's Exhibits 27 and 28 received in evidence)

MR. HOFMANN: If your Honor will allow me, very short, may I read to the jury the contents?

THE COURT: Yes.

MR. HOFMANN: 27 is an exhibit from Dennis Kozu concerning crew evaluation of Mr. Hicks and it states after being evaluated by Captain Michael Crosch, the master of the Endeavor and myself, it has been determined that Mr. Ciro Hicks has demonstrated his abilities to carry out the duties of tug mate on a class 3 or lower vessel. As of 11/18/08, Mr. Hicks is considered release from his training period and is a qualified class 3 mate. That's signed by Captain Dennis Kozu.

And then Exhibit 28 is dated November 24, 2008. It's to a Rhonda Chaffer. As per our earlier conversation, Mr. Ciro Charlie Hicks should be listed as a class 4 mate. And as of 11/05/08, his permanent position is mate on the Patriot.

Q. Now, as I just read, you were given a permanent assignment by Vane after your evaluation period, is that correct?

A. Yes, I was.

Q. And that was on what vessel?

A. That was on the tug Patriot.

Q. Can you describe what is the tug Patriot?

A. She has three engines in it. She is 3,000 horse power.

She has an upper wheelhouse, as you had seen, it has a tow

machine on it, pushing gear. She primarily tows the VB53, Vane

C94MHIC4

Hicks - direct

1 Brothers.

2 MR. HOFMANN: Your Honor, I offer into evidence what's
3 been marked as Plaintiff's Exhibits 2 and 3.

4 THE COURT: Any objection?

5 MR. FORDE: None, your Honor.

6 THE COURT: Plaintiff's Exhibits 2 and 3 admitted.

7 (Plaintiff's Exhibits 2 and 3 received in evidence)

8 THE COURT: Mr. Hofmann, also, for your planning
9 purposes, we will take our lunch break in about four minutes.

10 Q. Mr. Hicks, let me ask you this. I'm showing you what's
11 marked as Plaintiff's Exhibit 2. Can you tell us what that is
12 a photograph of?

13 A. That's a picture of the tug Patriot, a starboard side view.

14 Q. Starboard means what?

15 A. That's the right side of the tug.

16 Q. As you look forward?

17 A. Yes, sir.

18 Q. What's the left side of the tug?

19 A. The port side.

20 Q. Let me show you Plaintiff's Exhibit 3. Can you tell us
21 what this is a photograph of?

22 A. That's the stern view of the Patriot.

23 Q. Now, what sort of work in general did you say that the tug
24 Patriot did?

25 A. She strictly did oil work. She was assigned to the, as I

C94MHIC4

Hicks - direct

1 said before, the VB53.

2 Q. And where did the tug Patriot and the VB53 trade when you
3 were aboard her?

4 A. We used to sail from the James River all the way up, there
5 was a plant there, come down, and we also went to the Yorktown
6 River, and we were also on the east coast run up to IMTT,
7 Bayonne. That was a gas company. We used to take blue gas up
8 there.

9 Q. There is a phrase in the maritime business that's called a
10 hitch. What's a hitch?

11 A. A hitch is two weeks on, two weeks off. You go to work,
12 you work there two weeks, and then you go home for two weeks.

13 Q. Is that what your normal rotation schedule was?

14 A. Yes. Two weeks on and two weeks off.

15 Q. Now, what were your duties as mate on the tug Patriot?

16 A. To steer and operate the tug, hook up to the barge, put it
17 on the tow wire alongside, taking care of the crew.

18 Q. And in your job as mate would you have to, on the Patriot,
19 did you have to climb ladders?

20 A. Yes. You had to climb up to the upper wheelhouse.

21 Q. Any other times you would have to climb ladders when you
22 worked on the Patriot?

23 A. You see the ladders on the side, you used to have to put
24 them, to be able to go up on top of the barge.

25 Q. Did you as mate have to do that?

C94MHIC4

Hicks - direct

1 A. Yes, sir.

2 Q. Now, when you refer to the ladders, are you talking about
3 these things here that are on either side?

4 A. Yes, sir.

5 Q. How long of those ladders?

6 A. They are 30-footers.

7 Q. And would at times you have to climb all 30 feet to get up
8 on a barge?

9 A. Yes, sir.

10 Q. Now, you mentioned the upper wheelhouse. There is a ladder
11 that runs from a lower deck up to there. How high up is that
12 upper wheelhouse?

13 A. That was -- it had to be a good 24 foot or more.

14 Q. Is there another means or method of climbing up on barges
15 other than using wooden ladders like that?

16 A. What they call pigeonholes on the side of a barge or
17 ladder, if they have a ladder built into it.

18 Q. What is meant by a pigeonhole?

19 A. Picture a coffee cup, a large coffee cup with a little bar
20 in it just enough to get your foot in it and be able to climb
21 vertically straight up on it.

22 Q. If I may refer you to Exhibits 4 and 56. Do either of
23 these show barges that have pigeonholes and, if so, if you can
24 show the jury where they are.

25 A. These are what you call pigeonholes on a barge itself where

C94MHIC4

Hicks - direct

1 you have to climb up. This is a Bouchard. These are what you
2 call pigeonholes, coffee cups that you described.

3 MR. HOFMANN: Can I walk it in front of the jury for
4 two seconds.

5 THE COURT: Why don't you do that and then we will
6 take our lunch break.

7 Ladies and gentlemen of the jury, we will now take our
8 lunch break. It will actually be from 12:45 and we will resume
9 testimony promptly at 2:00. You'll have an hour and 15
10 minutes.

11 Now, we will need you back in the jury room several
12 minutes before 2:00. Otherwise, if people wander in at 2, we
13 have to wait until all of you are here until we actually bring
14 you out. We will try to be prompt on our end if you folks can
15 try to be prompt on your end. Sometimes you don't have control
16 over like the security lines downstairs, the lines in the deli.
17 But plan ahead for that so you take those moments into
18 consideration.

19 Some of you are taking notes. That's perfectly fine
20 and appropriate. I want to remind you or tell you that the
21 notes are for your use only. They are just a reminder to you
22 of some things that you have heard. Eventually, when you go
23 into the jury room and are deliberating, at the end of all of
24 the evidence, those notes should not become a substitute for
25 evidence. Just because one individual may have taken notes and

C94MHIC4

1 another individual may have not taken notes does not mean that
2 one individual's views of the facts should prevail over the
3 other individual's view. The evidence is the evidence, and you
4 shouldn't be showing anybody else your notes. They are just
5 for you.

6 Also, I just want to tell you to keep an open mind.
7 Until you have heard all of the evidence and the closing
8 arguments, you want to keep an open mind. While the evidence
9 is coming in, it comes in in pieces and it doesn't always come
10 in in a linear fashion. You hear bits and pieces as it goes
11 along. So keep an open mind.

12 Also, don't talk to each other about this case until
13 you are put into the jury room at the close of the closing
14 arguments and told, after instructed on the law, now is your
15 time to deliberate. Until then, just keep your thoughts about
16 this case, about the witnesses, about the lawyers to yourself.
17 Don't Twitter about it, don't e-mail anybody about it, don't
18 speak to anybody about it. Don't talk to any other juror about
19 it and don't talk to anybody, friend or family, about the case
20 until it is concluded. That's very important.

21 Let's take our lunch break. Thank you.

22 MR. HOFMANN: Will you also tell them that we are not
23 being rude if I don't say hello to them?

24 THE COURT: I told them that. They know.

25 (Jury not present)

C94MHIC4

1 THE COURT: I have one matter that I wanted to raise
2 and make sure that we have clarity on the record.

3 There have been a number of exhibits to which there is
4 no objection which helps the trial move right along. We are
5 not going through the motions or Mr. Hofmann hasn't been going
6 through the motions of actually laying a foundation for those
7 documents in particular, and some of them would be considered
8 hearsay.

9 I want to make sure that counsel understand and are
10 perfectly willing to accept that if documents go in without
11 objection that they are taking those documents in for all
12 purposes. If there is any objection for hearsay or anything
13 else, those objections need to be raised in advance to there
14 being admitted without objection. Are we all on the same page?

15 MR. HOFMANN: We are, your Honor.

16 MR. FORDE: Yes, your Honor.

17 THE COURT: I'm sure you had spoken about it, but I
18 wanted the trial record to reflect that the fact that these
19 things are going in in the manner that they are is perfectly
20 clear for posterity.

21 MR. HOFMANN: I think you are probably used to the
22 criminal field where everything is a fight over every possible
23 bit.

24 THE COURT: That's certainly true. Even in many of
25 the civil cases, that's also true. I'm not suggesting that we

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1 have to do anything differently. I just want to make sure for
2 the record that there is not an argument about the use of an
3 e-mail, for instance, or something of that nature.

4 MR. FORDE: This is all preliminary stuff, your Honor.

5 THE COURT: Terrific.

6 Is there anything you folks would like to raise with
7 me?

8 MR. HOFMANN: No, thank you.

9 THE COURT: I have I have a criminal matter in this
10 room at 1:00. I don't need you to move everything, but I'll
11 need the first two seats. If you could push things to one
12 side, if you could. You're welcome to be in the courtroom
13 while I have this matter, but you'll just need to move back a
14 little bit.

15 (Recess)

16 (Continued on next page)

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C94VHIC5

Hicks - direct

A F T E R N O O N S E S S I O N

2:05 P.M.

THE COURT: All right.

Let's bring the jury back in.

We're trying to warm this place up.

(Jury present)

THE COURT: Ladies and gentlemen of the jury, I have tried to get a hold of our maintenance group to try to warm this room up a little bit. It's actually a little bit cold for me. It may be too cold for all of you. By nods of the head, is there anybody who is cold? You are cold.

So we'll see if we can make it not too warm. You folks are directly underneath a couple of vents.

All right.

Mr. Hofmann.

MR. HOFMANN: Thank you, Judge.

BY MR. HOFMANN:

Q. All right.

Mr. Hicks, let me get a little more detail about the towing operation on the Tug Patriot. And so to do so, I'm going to ask you to explain to the jury some structures that are shown in photo Exhibit Plaintiff's 3.

I've got the pointer here, and I'm just going to ask you to explain what certain structures are.

Can you see the photo, Mr. Hicks, from there?

C94VHIC5

Hicks - direct

1 A. Yes, sir.

2 Q. I'll turn it a little bit. I just want the jury to be able
3 to see.

4 Now, you indicated, just to get our orientation back
5 since the lunch break, that a tugboat will tow with its wire
6 barges, right?

7 A. Correct.

8 Q. And you talked about the bridles and connections, etc.

9 Now, I want you to tell the jury, what is this
10 machinery that I'm pointing to right back here on the back of
11 the Patriot?

12 MR. FORDE: Your Honor, could we have Mr. Hofmann step
13 back a little bit? We can't actually see where he's pointing
14 to.

15 THE COURT: You know, there's a fine line between the
16 jury being able to see it. And all of the above should be able
17 to see this.

18 Why don't I suggest that -- counsel, would you mind,
19 why don't you come over here just for a second.

20 MR. HOFMANN: I have no problem with --

21 THE COURT: Just stand over -- don't get in the court
22 reporter's way, but stand over there.

23 MR. HOFMANN: Is that good, Judge?

24 THE COURT: All right.

25 MR. HOFMANN: Good?

C94VHIC5

Hicks - direct

1 MR. FORDE: Perfect.

2 MR. HOFMANN: All right.

3 And also, Mr. Hicks has to see it, as well as the
4 jurors.

5 BY MR. HOFMANN:

6 Q. Okay. This large machine here, what is that called?

7 A. It's a towing machine.

8 Q. And what is the purpose -- what does a towing machine
9 consist of?

10 A. It's driven by a diesel motor, and it has a wire on a drum
11 which is operated by the captain, or more in that upper house
12 right there. The doghouse. It's to get the barge away from
13 you in sea conditions safely enough to tow it. Very difficult
14 to tow alongside, which I was explaining before, on a hit,
15 because you and the barge could be crashing into one another.
16 And if it's a gas barge, I don't need to tell you what the
17 results of that is. But it could be very dangerous to the tug,
18 putting a hole in it or damaging the vessel itself or the barge
19 itself. And the VB53 was a single skin. That's why everybody
20 puts them on a tow wire in a sea condition, as you can see.

21 Q. You used a term "a single skin." What does that mean?

22 A. Single skin is barges that are just one layer of steel.
23 Behind the steel is the gas or the oil, whatever it might be,
24 that they are carrying at that time. That's what a single skin
25 barge is called.

C94VHIC5

Hicks - direct

1 Today they are double skin, which protects the bottom
2 of the barge from running aground. If it ran aground, it would
3 puncture the first layer of steel on the side of the barge. It
4 has the same principle, to protect the barge and the contents
5 and the environment, actually.

6 Q. Now, what about when you're pushing in the notch, which you
7 explained, is that also something that when you encounter
8 weather, you have to change?

9 A. When you're pushing in a notch and the weather can kick up,
10 you have to get out of the notch and go on the tow wire, which
11 is right there.

12 Q. Okay.

13 Now, do you see this steel bar that's here?

14 A. Yes.

15 Q. And can you tell the jury what is that called and what's
16 its purpose?

17 A. It's called the Texas bar. It's a steel bar that runs
18 across from both sides of the tug, from the port to the
19 starboard. And there is --

20 Q. What's the purpose of the Texas bar?

21 A. It protects the wire, keeps the wire from chafing off the
22 stern in the tug where it says "Patriot." It keeps the wire up
23 off the vessel itself from cutting into the bar, the tug
24 itself, and cutting the wire.

25 Q. Do you see this little round object here?

C94VHIC5

Hicks - direct

1 A. Yes.

2 Q. And what is that called?

3 A. That's called the doughnut.

4 Q. And what is a doughnut?

5 A. A doughnut is a steel wheel. It's built on the Texas bar,
6 which allows the wire to ride in there, because a wire will
7 tend to stretch in and out constantly. So when it's on the
8 wheel, the wheel will turn like this, protecting the wire. And
9 also when you're running the wire out, it protects it from
10 cutting up against the Texas bar itself.

11 Q. What can happen if you don't use the wheel, the doughnut,
12 what can happen to the wire?

13 A. If you don't use the doughnut, what happens is the wire
14 constantly keeps chafing, and it doesn't take long for the
15 build-up enough for friction and heat, it could break.

16 Q. Now, let me show you --

17 MR. HOFMANN: And let me offer into evidence Trial
18 Exhibit 5.

19 THE COURT: Any objection?

20 MR. FORDE: No objection, your Honor.

21 THE COURT: Plaintiff's Exhibit 5 admitted.

22 (Plaintiff's Exhibit 5 received in evidence)

23 Q. If you could hold this up and show it to the jury,
24 Mr. Hicks.

25 Can you tell us what does Trial Exhibit 5 display?

C94VHIC5

Hicks - direct

1 A. This is called a safety chain, which wraps around on one
2 side of the wire, the front part, and all the way around to the
3 back part. That allows the cable to stay stationary in the
4 doughnut. So if there's any sea condition bouncing up and
5 down, the wire can't lift up and come out of the doughnut; it
6 stays permanent right there. And it's a safety chain
7 protecting the wire.

8 Q. Does that picture depict a Texas bar?

9 A. Yes, it does.

10 Q. What else does it depict?

11 A. It shows the doughnut, and it also shows the safety chain
12 that's on there holding the wire.

13 Q. Does it show a wire?

14 A. Yes, it does. And also the cable, the wire.

15 Q. Is this a typical configuration of when you're towing an
16 oil barge of the equipment on the stern?

17 A. Yes. You would use this on anything, oil barge, or even if
18 you were towing rock scowls or --

19 Q. Does the Tug Patriot have the same equipment that's
20 depicted in Trial Exhibit 5?

21 A. Actually, it looks the same. Yeah, it's a simple hook on
22 it. It has a spring release right here. As you can see, that
23 allows you to snap it on quickly and snap it on the other end
24 quickly.

25 Q. My question was does the Tug Patriot have this equipment on

C94VHIC5

Hicks - direct

1 it?

2 A. Yes, it does.

3 Q. Okay.

4 You can put the photo --

5 MR. FORDE: Are you done with --

6 MR. HOFMANN: Wait a minute.

7 We're almost there.

8 MR. FORDE: Okay.

9 Q. Now, why do you use this -- is there a reason why the
10 safety chain that you talked about is used?

11 A. It protects the wire from jumping out of the doughnut. And
12 this particular tug, prior to this, lost the barge for that
13 reason, for not having a wire in the doughnut.

14 Q. Were you involved in having something to do with the wire
15 that was lost?

16 A. No, that was the other watch. When we said I worked two
17 weeks, there's another watch that comes in for that two weeks.
18 That was John Cater, the captain at that time.

19 Q. Were you involved in restoring the cable or reinstalling
20 the cable?

21 A. Yes, we were brought in to Philadelphia when the wire came
22 in to -- and take the old one off and put the new one on.

23 Q. When the tow wire is not out, where do the doughnuts sit?

24 A. They sit off on a port or starboard side, depending on the
25 last tow.

C94VHIC5

Hicks - direct

1 Q. Now, did Vane Line Bunkering have a policy of when
2 doughnuts were to be used on the Tug Patriot?

3 MR. FORDE: Objection.

4 THE COURT: Overruled.

5 A. We received a memo from Vane Line.

6 Q. Is the answer yes?

7 A. Yes, sir. I'm sorry.

8 Q. Could you tell us what the Vane Line policy was?

9 A. The policy was that the wire had to be in the doughnut at
10 all times and secured with safety chain.

11 Q. When the wire was out?

12 A. When the wire was in operation.

13 Q. Now, in what form of -- how did you learn about this
14 policy?

15 A. Every week when you come aboard, there's new memos and
16 safety regulations and rules that they want you to abide by.
17 We received a memo that the vessel is not to be -- the wire is
18 not to be used at any time without the doughnut nor the safety
19 chain; it must be used at all times. Captains and mates must
20 secure the doughnut and the wire with the safety chain.

21 Q. Now, were you -- as part of your training back in
22 September, when you were first training with the company, was
23 that a topic that was addressed?

24 A. Yes.

25 Q. And tell us what you were taught and by whom and how.

C94VHIC5

Hicks - direct

1 THE COURT: Are we at the point now where counsel can
2 return now perhaps?

3 MR. HOFMANN: I'm going to get into how you get into
4 it, and we'll be using the photograph.

5 THE COURT: Do you feel like you need to be here
6 anymore?

7 MR. FORDE: No. We've got it.

8 THE COURT: Seared to the brain.

9 MR. FORDE: Seared to the brain, yes.

10 THE COURT: All right.

11 Seared to the brain.

12 MS. FARRAR: Thank you, your Honor.

13 THE COURT: All right.

14 So there was a pending question. Would the court
15 reporter read back that question.

16 (Record read)

17 A. When I had my training on the Tug Endeavor, the guy I was
18 working with, his name was -- gentleman's name was Mike. And
19 he was the captain -- he was actually the master of the vessel.
20 And he was explaining to me -- when I had to do the practice of
21 catching the doughnut and putting it out, he explained to me
22 that you must -- the company's rule is to use the doughnut and
23 the safety chain at all times. That's what I was taught right
24 at the beginning. So you don't forget it. They put you on
25 another boat and you do it for another two weeks.

C94VHIC5

Hicks - direct

1 Q. Now, when and how do you get the wire into the doughnut?

2 A. Normally, when you're running the cable out, you'll --

3 you'll take the tug and you'll swing it this way, which will

4 put the wire the opposite direction. That will put the wire

5 all the ways down on one end. The wire will slip onto the

6 Texas bar, and the doughnut will be right there, and it will

7 catch it right at that point. There's like a smooth edge. It

8 goes right up to where the doughnut sits. The wire comes in,

9 falls into that, and then you back off the throttles. The wire

10 will come up slowly right on top of the Texas bar. Or when I

11 was working on the Vane Brothers, the other ways, tight

12 quarters, you really need to get it up quick. Two guys shove

13 it right up and push it into position.

14 Q. All right.

15 Let's turn to the events of your voyage in April of

16 2009.

17 Did you sail on the Tug Patriot in 2009?

18 A. Yes, I did.

19 Q. Were you doing your normal two-week on/two-week off?

20 A. Yes, I was.

21 Q. Did there come a time in April that you joined the Tug

22 Patriot for one of your hitches?

23 A. Yes, I did.

24 Q. When did you join the vessel?

25 A. I joined it, I believe it was, a day later. They flew me

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Hicks - direct

1 down to -- I was filling in on another boat, and they flew me
2 down to Virginia.

3 MR. HOFMANN: Your Honor --

4 Q. Would the logbook for the Patriot help refresh your memory
5 as to when you joined the vessel?

6 A. Yes.

7 MR. HOFMANN: Your Honor, I offer Exhibit 6, Trial
8 Exhibit 6.

9 THE COURT: All right.

10 Any objection?

11 MR. FORDE: To the extent that -- yes, your Honor.

12 THE COURT: I don't think you need to offer it into
13 evidence if you just want to have it refresh his recollection,
14 unless you've got another purpose for it.

15 I was going to wait and see if anyone had an
16 objection. But if it's just to refresh his recollection, you
17 can go ahead and show it to him.

18 MR. HOFMANN: Okay, your Honor.

19 Q. Let me show you what has been marked as Exhibit 6, and show
20 you these pages for April -- can you tell us what information
21 is contained in the vessel logbook in general?

22 THE COURT: Okay, in general. Not what you're seeing
23 on the page, but just generally describe the logbooks in your
24 experience.

25 A. Logbook keeps track of where you're at at all times, what

C94VHIC5

Hicks - direct

1 time you did it, what you were doing, who was on the vessel.

2 It's a method for the Coast Guard to track down what exactly is
3 going on with the boat itself and the company.

4 Q. If you would take a look at the entry for the 15th of
5 April. Does that indicate who was on the vessel?

6 A. Yes. It was John Cater, Bruce Comiskey, Mark Johnson,
7 Vinny Lusardi, and Glenn Scoggins was on the vessel.

8 Q. Take a look at the April 15th, Mr. Hicks.

9 THE COURT: Rather than reading it, just look at the
10 names and see whether it refreshes your recollection as to who
11 was present.

12 A. Bruce Comiskey, myself.

13 Q. Does that refresh your recollection --

14 A. Yes.

15 Q. -- as to when you joined the vessel?

16 A. Yes, it does.

17 Q. Do you recall where the vessel was at the time you joined
18 it?

19 A. It was at anchorage in Yorktown.

20 Q. And what does it mean to be at anchorage?

21 A. At anchorage is where Yorktown, the refinery Western is
22 there. Sometimes when there's a barge inside, we have to wait
23 at the anchorage, which is directly right across from the
24 refinery. They pull out; we pull in.

25 Q. Is an anchorage like a parking spot in the water?

C94VHIC5

Hicks - direct

1 A. Yeah. Big parking lot for tugs and barges.

2 Q. And were you at anchorage for a couple of days?

3 A. Four days.

4 Q. Then what happened with the vessel?

5 A. They repaired it. And then we went into Western. They
6 fueled the VB53. And then that was going up into the James
7 River.

8 Q. How was it going to go into the James River?

9 A. We had made up to the vessel with the tug. And we had
10 pushed across the Chesapeake on -- what we did was we ran up
11 into the James River, all the way up to a refinery that we went
12 up to there. Actually, not a refinery, a storage tank area
13 where they distribute the fuels from.

14 Q. Where was that storage tank area?

15 A. It's all the ways up in the James River. The name of the
16 refinery I can't remember, to be honest with you. I was only
17 there a couple of times.

18 Q. All right.

19 So after you -- how long did it take to push the VB53
20 up to that tank farm?

21 A. Well, we met the pilots in Newport News. It was roughly
22 about a day and-a-half.

23 Q. Now, do you recall sailing on the vessel on April 21st,
24 2009?

25 A. Yes, I do.

C94VHIC5

Hicks - direct

1 Q. You were sailing on the Patriot?

2 A. Yes, I was.

3 Q. What hours did you work that day?

4 A. Midnight to six in the morning; the second watch, the
5 mate's watch.

6 Q. Those are the only hours you worked?

7 A. Also 12 noon to six in the evening.

8 Q. Let's talk about the 12 noon to six in the evening watch
9 you worked.

10 A. Correct.

11 Q. Where were the vessels at that time?

12 A. We were coming up -- coming down out of the James River.
13 We were approaching Newport News. And we were going to be
14 letting the pilots off at that point.

15 Q. Who was at the helm?

16 A. I was.

17 Q. And meaning -- the "helm" means what?

18 A. I was steering the tug from the pilot house.

19 Q. I'm going to show you what we've marked as Trial Exhibit
20 7A.

21 MR. HOFMANN: And I'll offer Trial Exhibit 7A.

22 THE COURT: Is it a map of the Chesapeake area?

23 MR. HOFMANN: It is.

24 MR. FORDE: No objection, your Honor.

25 THE COURT: All right.

C94VHIC5

Hicks - direct

1 Exhibit 7A, admitted.

2 (Plaintiff's Exhibit 7A received in evidence)

3 MR. HOFMANN: Your Honor, may I ask permission to have
4 Mr. Hicks come up and hold the chart up against here so that he
5 could point things to the jury?

6 THE COURT: Sure.

7 Q. Now, Mr. Hicks, could you tell us what you recall about the
8 voyaging of the tug and the VB53.

9 THE COURT: Could I ask you to back up just one step
10 just so that it's perfectly clear to the jury. Why don't you
11 describe the geographical area that we're looking at here, what
12 that waterway is.

13 THE WITNESS: This is the James River coming down
14 through here.

15 THE COURT: In where? In what state?

16 THE WITNESS: Virginia, ma'am. I'm sorry.

17 THE COURT: I just want to go back, sort of the first
18 principles, makes sure everybody knows where you were.

19 THE WITNESS: I'm sorry.

20 THE COURT: No, no, no. Just for clarification of the
21 record.

22 BY MR. HOFMANN:

23 Q. And you can maybe use this pointer, Charles.

24 You took over the watch at what time?

25 A. At 12 noon.

C94VHIC5

Hicks - direct

1 Q. And what landmark city were you on the way approaching?

2 A. We were coming down out of the James River. We were right
3 in the main channel right here. And we were coming down along
4 this way, coming to Newport News, which is right here.

5 This is the tunnel.

6 Q. So you were approaching Newport News?

7 A. Correct.

8 Q. When you took over the watch at 12 o'clock, did you have a
9 conversation with the captain as to his orders as to what was
10 to be done with the vessel?

11 A. He gave me orders that -- to get him up just before Newport
12 News. He wanted to get up to operate the tug and handle it
13 himself. He wasn't that familiar with the tug, so he wanted to
14 get more familiar with the tug on putting it on the wire.

15 Q. Before you approached Newport News, how were you moving the
16 barge with the tug?

17 A. We were in a notch pushing it down the river. I was at the
18 controls with the pilot.

19 Q. And did there come a time when you changed it over from
20 being in the notch to going on the wire?

21 A. Yes. When we got down near Newport News, I let go of the
22 push gear and swung around, threw a line up, a rope up to the
23 stern.

24 Q. Let me ask my questions before we get to these things.

25 A. I'm sorry.

C94VHIC5

Hicks - direct

1 Q. Was there a reason why it was going to go from being in the
2 notch to being on the wire?

3 A. Yes, the sea conditions going across the Chesapeake to
4 Yorktown.

5 Q. Let me show you what we premarked as Exhibit 7B, which
6 is --

7 MR. HOFMANN: Just leave that there, Lou. Just leave
8 that up there for a second.

9 Q. Let me just ask a few preliminary questions.

10 Mr. Hicks, is this a nautical chart showing the lower
11 part below Newport News and parts of Chesapeake Bay?

12 A. Yes, it is.

13 MR. HOFMANN: Your Honor, I offer Exhibit 7B.

14 MR. FORDE: No objection, your Honor.

15 THE COURT: All right.

16 Plaintiff's Exhibit 7B, admitted.

17 (Plaintiff's Exhibit 7B received in evidence)

18 Q. Let me hold it up for a second, Mr. Hicks.

19 And can you show where -- does the chart show where
20 Newport News is?

21 A. Yes, it does.

22 We are right over here, Newport News.

23 Q. Is that labeled there?

24 A. It should be.

25 Q. Well, is it?

C94VHIC5

Hicks - direct

1 A. Yes.

2 Q. Now, you mentioned something about Chesapeake Bay.

3 Where is Chesapeake Bay?

4 A. Well, it's all of this right in here.

5 Q. And what are the land bodies around here? Is that what's
6 known as the Delmarva Peninsula?

7 A. Yes, it is.

8 Q. Which is Delaware, Maryland, and then Virginia; correct?

9 A. Yes.

10 Q. All right.

11 Now, where was the boat intending to go?

12 A. We were going to Yorktown, which is up in the river, up in
13 here.

14 Q. And that's the York River?

15 A. Yes, it is.

16 Q. That's labeled on this chart also, right?

17 A. Yes, it is.

18 Q. Now, we're asking questions about why you were going from
19 pushing in the notch to going on the wire.

20 Could you explain using the chart.

21 A. Well, when you're coming down and out of here, you've got
22 the entire ocean barreling in on the Chesapeake Bay.

23 What happens is the sea condition can get real rough
24 in this area, when you're coming across, until you get up into
25 about this area, then it starts to calm down, because you

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Hicks - direct

1 have -- actually call it the land mass protecting the body of
2 water in that area. But it still can be quite a problem in
3 this area also at the same time.

4 Q. So what do you do?

5 MR. FORDE: Objection.

6 THE COURT: Sustained.

7 Why don't you reword it.

8 Q. What is the procedure that was to be followed on the
9 Patriot that day?

10 A. Right at Newport News there's a small area of an anchorage.
11 And it's a safe place to put the wire out, get everything set
12 up before you head out in this area across the tunnel.

13 Q. All right.

14 You can go on back to your seat.

15 So now you can tell us, Mr. Hicks, what did you do as
16 you approached Newport News? Tell the jury what actions you
17 took as a mate of the vessel.

18 A. I had broken down the tug from push mode and swung around,
19 let go of the push gear, swung around, and caught the stern
20 line first is what we normally do. Catch the bowel line, and
21 then what we do is take the receiving line from the barge. We
22 bring that down on deck. What we do is we put it across -- I
23 don't know if you can see it on there. There's a --

24 Q. Keep giving a verbal --

25 A. We run the rope right around the cleat. We pull it in on a

C94VHIC5

Hicks - direct

1 drum, which is connected to the tow machine. That brings the
2 cables right on board the tug itself to be able to took it up.

3 Q. This is the cable that comes from the barge?

4 A. Correct.

5 Q. All right.

6 Then what happens?

7 A. What you do is you --

8 Q. Or what did you do, rather than in general.

9 A. What we did was we set up the shackles. We hooked in the
10 bridle, set up into the tow wire itself. I was on the stern.
11 I had ran the wire out a little bit so it would fall down on
12 deck for them.

13 Q. When you say you were on the stern, where were you?

14 A. I was in the doghouse.

15 Q. Okay.

16 Again, which is the little house up above, right?

17 A. Yes.

18 Q. Okay.

19 Continue.

20 A. I return.

21 The engineer started the winch. I let the drum peel
22 out a little bit, which that allows you to -- the deck hands
23 have to lift the wire and bring it back up over the Texas bar.
24 So when it falls down over the Texas bar, that allows them to
25 have the cables right there, and then hook into -- it's a large

C94VHIC5

Hicks - direct

1 shackle with a big screw and a nut on it. I mean it's --

2 Q. What do you mean by a shackle? I don't know that the jury
3 knows what a shackle is.

4 A. A shackle is a shape like this, almost like a horseshoe,
5 with two holes on each side. And what it does is there's a
6 two-inch bolt that runs through this, and then there's a nut on
7 the end. You screw the nut on, and then there's a hole right
8 at the end where the nut is, and you run a welding rod through
9 that. You bend that over. That keeps the nut from vibrating
10 off the shackle itself.

11 Q. The shackle shackles two things together?

12 A. Correct.

13 It shackles the bridles together, and makes a
14 connection with the tow wire.

15 Q. You did that work.

16 Then what happened?

17 A. The captain was up. He came to the doghouse where I was.
18 And I had just let go of the bowel line. As I came around, we
19 let go of the stern line. The deck hands knew to let go of the
20 bowel line, let go of the stern line.

21 As I came around, I caught the doughnut right off the
22 starboard side there. I picked it right up. And it came right
23 up above.

24 Q. When you say you picked it up, what do you mean?

25 A. The wire fell into the doughnut. It was off on the side of

C94VHIC5

Hicks - direct

1 the tug there, which is the starboard side. It fell right into
2 it. And I brought the wire right up on top of the Texas bar.

3 Q. Where were you at that time?

4 A. I was in the aft doghouse.

5 Q. After you did that, after you got the wire up in the
6 doughnut, what happened next?

7 A. The captain came down to the stern of the boat in the
8 doghouse.

9 And he said, I want to let some more wire out.

10 I said, Well, we're going across the tunnel at this
11 point.

12 He proceeds to take over. He says, Well, I got it.

13 He took over and started to peel out the wire.

14 Q. Took over what?

15 A. Took over the controls of steering and the tow winch motor
16 itself.

17 Q. Where did you go?

18 A. I went right on the outside of the doghouse to make sure
19 that the brake was off; because he had turned the brake off,
20 and I just wanted to make sure that it was off enough.

21 And at that particular point, the wire jumped out of
22 the doughnut, and we were fighting it back and forth.

23 He said, Okay. Look.

24 I said, What do you want to do? We got a --

25 Q. Wait a second.

C94VHIC5

Hicks - direct

1 What do you mean by "we were fighting it back and
2 forth"?

3 A. Well, he was in there. He was trying to catch it back and
4 forth, and he couldn't grab the wire.

5 Q. What was he doing?

6 A. He was maneuvering the tug, the stern of the tug, to the
7 left, to the right, trying to manipulate to catch that wire
8 again on one side or the other, either the starboard or --
9 starboard or portside of the vessel.

10 Q. While he was operating the vessel trying to catch the wire,
11 where were you?

12 A. At that point, I went down --

13 Q. Where were you as he was manipulating? That's the first
14 thing I want to know.

15 A. I was right there next to him.

16 Q. Okay. So then what happened?

17 A. I said to him, I said, Look, do you want -- I'll go down,
18 I'll push -- get this doughnut up on there before we cut this
19 wire.

20 We just put this on a couple of months ago.

21 He got a little frustrated. Said, Yeah, get down on
22 deck and push the doughnut up.

23 I said, Okay. Fine.

24 So I went, crawled down the ladder on the -- you could
25 see it there. I went down on the ladder to the lower deck.

C94VHIC5

Hicks - direct

1 Q. Okay.

2 What did you see when you got down there?

3 A. The two deck hands were standing on the stern right there
4 on the starboard corner. And right next to the towing machine
5 was Mark Johnson, the engineer.

6 Q. So what did you do now?

7 A. I went over towards the Texas bar, and I had flagged the
8 two deck hands to come over to give me a hand to push the --
9 well, actually, I flagged over Glenn, my deck hand, to push the
10 doughnut up onto the Texas bar, which I had showed you before.

11 Q. Why do you call Glenn your deck hand?

12 A. Glenn always worked my watch, the 12 to midnight -- from
13 midnight to six in the morning. We were always teamed up
14 together. He was my deck hand. And Vinny Lusardi was Bruce's
15 deck hand.

16 Q. So you motioned to Glenn, your deck hand, to help; is that
17 right?

18 A. To give me a hand.

19 Q. What happened?

20 A. They proceeded to go up and walked away and said, like
21 this. And they walked away up to the forward part of the boat,
22 which is where the galley is where they went into.

23 Q. You just made a hand gesture and shook your head; is that
24 right?

25 A. Yeah. He just said, and walked up the starboard side there

C94VHIC5

Hicks - direct

1 to the pilot house.

2 In turn, I went to proceed to push it. I called Mark
3 Johnson. I said, Mark, I said, come on give me a hand with
4 this thing.

5 He flagged up and he said, No. You remember, no, I
6 can't do it.

7 Q. He said to you, You remember I can't do it?

8 What did that mean?

9 A. The captain had a conversation with myself and Mark Johnson
10 not to help the deck hands out anymore on deck when it came to
11 hooking up the wire, because they were -- they were scared of
12 the wire. Hooking it up back there can be really dangerous. I
13 mean you got to do it, you got to do it quick, and you got to
14 get it done, and you got to get it over.

15 So normally I would jump down to give them a hand or
16 the engineer would help to assist in doing this.

17 Actually --

18 Q. Okay.

19 Let's not go on too far.

20 You said to Mr. Johnson, Give me a hand.

21 Was he on deck at the time?

22 A. He was standing right next to the tow machine.

23 Q. And what was his response when you asked give me a hand?

24 A. He looked up towards Bruce Comiskey and said, No. You
25 remember the conversation we had.

C94VHIC5

Hicks - direct

1 And I said, Come on, Mark. Give me a hand with this
2 thing.

3 He said no.

4 THE COURT: Let me just ask, why is the wire
5 dangerous?

6 THE WITNESS: Well, six months ago, they killed a kid
7 with a tow wire.

8 THE COURT: It can just -- sort of moves across and
9 act --

10 THE WITNESS: Your Honor, slice you like a piece of
11 butter. It's extremely dangerous.

12 THE COURT: Okay.

13 BY MR. HOFMANN:

14 Q. Now, when you were down on deck, where was Captain
15 Comiskey?

16 A. He was in the doghouse right there.

17 Q. On the stern?

18 A. On the stern.

19 Q. After Mr. Johnson said no, what did you then do?

20 A. I proceeded to push the doughnut up on top of the Texas bar
21 to protect the wire. We were maneuvering. As I got the wire,
22 as I got the doughnut up to about, I would say -- can I point
23 to that?

24 Q. Just tell the jury --

25 A. All right.

C94VHIC5

Hicks - direct

1 As I got it up there about more than a quarter of a
2 way, the next thing I know, the doughnut is coming in my arm,
3 slams my -- well, my arm was stretched all the way out; it was
4 stiff as a board like this. When it hit me, it shot in the
5 palm of my hand and my shoulder went out. My shoulder got out
6 of the socket itself.

7 Q. So what did you do with the doughnut?

8 A. I let it go.

9 Q. Then what happened next?

10 A. I ran over -- I was in a ton of pain. And Bruce was
11 looking at me right at that point. I had asked -- I went over
12 to Mark.

13 And I said, Mark, please, pull my shoulder down.
14 Either I pulled my shoulder out of the socket or my muscle
15 damaged something or other.

16 He grabbed my arm, pulled it down. Then I backed off
17 of him like this, trying to stretch it to get it to pop back
18 into -- I guess you call, I don't know medical terms, the joint
19 or the rotator cuff, whatever that is.

20 At that point, I went forward, went up the -- on the
21 bow there's a set of regular steps to go up. That's when I
22 went up.

23 Q. Did the wire ever get put into the doughnut on the Texas
24 bar at that time?

25 A. No, not then.

C94VHIC5

Hicks - direct

1 Q. You went where? After you had Mr. Johnson help you, as you
2 said, what did you do next?

3 A. I went into the galley. I had asked Vinny if he could do
4 me a favor and please get me a bag of ice. I explained to him
5 what happened.

6 I said, you know, I must have pulled my shoulder out
7 or damaged a muscle or something or other.

8 So Vinny was kind enough to get me a bag of ice. And
9 I went up into the pilot house.

10 Q. Slow down.

11 After you put the ice on it, what did you do next?

12 A. Bruce was at the helm at that time.

13 Q. Just asking what did you do next.

14 A. I went into the pilot house and said, I got it.

15 Q. Who was there in the pilot house?

16 A. The captain.

17 Q. Were you still on watch?

18 A. Yes, I was.

19 Q. So was it your responsibility to take over steering the
20 boat?

21 A. Yes, I was.

22 Q. Did you have conversation with Mr. Comiskey at that time?

23 A. I had said to him -- I said, My arm, I sprained my arm in
24 the back.

25 I was trying to not make a big deal out of this at

C94VHIC5

Hicks - direct

1 this particular point.

2 Q. What happened with Mr. Comiskey then?

3 A. He said, Are you all right?

4 And I said, Yeah, I guess. I mean I was in tears. So
5 what I did was -- he left the pilot house. I sat down in the
6 chair, and I put the ice on my shoulder.

7 THE COURT: Let me just ask, how much time has elapsed
8 between the time that you have maneuvered the doughnut,
9 experienced the shoulder incident, and going back into the
10 pilot house where you're now sitting down, what length of time
11 are we talking about?

12 THE WITNESS: Your Honor, I'd say between -- it
13 couldn't have been no more than 10, 15 minutes tops.

14 THE COURT: All right.

15 Thank you.

16 MR. HOFMANN: Thank you, your Honor.

17 BY MR. HOFMANN:

18 Q. Did you finish your 12 to six watch?

19 A. Yes.

20 Q. What did you do next?

21 A. When I sat down with the ice, I called down to Vinny. And
22 I asked Vinny to get another bag of ice for me, because the bag
23 was just dripping all over the place.

24 Vinny, he brought me up another bag of ice. There's a
25 phone system that you can call one another up. He just

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Hicks - direct

1 happened to be in the galley at the time, and I had asked him.

2 At that point, when the captain came in, I just went
3 straight to my room. And my room is right behind the pilot
4 house. I just got to open the door, and I'm like five steps to
5 my quarters.

6 Q. Did there come a time later that evening that you had
7 another conversation with Captain Bruce Comiskey regarding this
8 incident?

9 A. Yeah. We were filling out -- he said I had to fill out an
10 accident report.

11 Q. How did that come about? Where were you having this
12 conversation?

13 A. We were in the pilot house.

14 Q. Was this on the change of watch?

15 A. At midnight itself.

16 Q. And what did you say to him, what did he say to you?

17 A. He said, Well, you got to fill out an accident report. And
18 you have to -- I had put down on the --

19 Q. Well, let's --

20 A. Go ahead. I'm sorry.

21 Q. -- stay with what I'm asking you, all right?

22 Mr. Comiskey told you you had to fill out an accident
23 report?

24 A. Correct.

25 Q. Is that correct?

C94VHIC5

Hicks - direct

1 Let me show you Trial Exhibit 9.

2 MR. HOFMANN: And let me offer Trial Exhibit 9 in
3 evidence.

4 MR. FORDE: No objection.

5 THE COURT: All right.

6 Thank you.

7 Plaintiff's Exhibit 9, admitted.

8 (Plaintiff's Exhibit 9 received in evidence)

9 THE COURT: Let me ask you, Mr. Hicks, what time of
10 day did the incident occur with your shoulder?

11 THE WITNESS: Between 16:00 and 16:30.

12 THE COURT: So between 4 and 4:30 in the afternoon?

13 THE WITNESS: Yes, ma'am.

14 THE COURT: Okay.

15 So that was during your noon to 6 p.m. watch?

16 THE WITNESS: Yes, ma'am.

17 THE COURT: And then you went off duty at 6 p.m.?

18 THE WITNESS: Yes, ma'am.

19 THE COURT: And then your next conversation with the
20 captain was around midnight?

21 THE WITNESS: Well, it was around 5:30. We usually
22 change between 5:30 and 6 o'clock.

23 THE COURT: Okay.

24 I'm just trying to get the timeline, Mr. Hofmann, of
25 when the incident report got filled out.

C94VHIC5

Hicks - direct

1 MR. HOFMANN: Yeah, that's what I was going to get to.

2 THE COURT: All right.

3 BY MR. HOFMANN:

4 Q. When did you have the conversation about filling out the
5 incident report, was that at the change of night at midnight?

6 A. Yes, it was.

7 Q. All right.

8 Is this exhibit the incident report you filled out?

9 A. Yes.

10 Q. In response to him telling you to do so?

11 A. Yeah, to fill out the incident report, which is this.

12 Q. Does it have your signature on it?

13 A. Yes, on the last page.

14 Q. And does it have the date?

15 A. Yes, it does, on 4/21.

16 Q. And is that -- and you signed it on 4/21?

17 A. Yes, I did.

18 Q. All right.

19 In that report, did you describe how you got hurt?

20 A. Yes, I did.

21 Q. Could you read to the jury what you wrote.

22 A. I tried to lift a doughnut up on the Texas bar and pulled
23 on my shoulder. I pulled on my shoulder, right arm. Time,
24 16:30.

25 Q. Now --

C94VHIC5

Hicks - direct

1 MR. FORDE: Objection, your Honor.

2 That was not -- that's not actually verbatim of what's
3 in the --

4 THE COURT: All right.

5 Why don't we just read it verbatim. Since it's in
6 evidence and so it can be published to the jury, why don't we
7 have Mr. Hofmann read it.

8 MR. HOFMANN: Thank you, your Honor.

9 Q. It says: "Describe the incident in detail, including what
10 happened before the incident, any steps taken to avoid the
11 incident, whether human error played a role in the incident."

12 And what's written in handwriting -- is this your
13 handwriting?

14 A. Yes, it is.

15 Q. All right.

16 "Trying to lift doughnut up on Texas bar and pulled on
17 shoulder, right arm. Time, 16:30."

18 Now, did you stand your next watch, which would be at
19 6 a.m. on the 23rd?

20 A. At 6 a.m. did I stand my --

21 Q. No. You would have been on the midnight watch, right? I'm
22 sorry.

23 A. Yes, the midnight --

24 Q. Did you stand the midnight watch on April 23rd?

25 A. Yeah, we were -- yes, I did.

C94VHIC5

Hicks - direct

1 Q. Where was the boat by this time?

2 A. We were right at anchorage.

3 Q. Where?

4 A. In Yorktown Heights.

5 Q. Did there come a time when you -- were you scheduled to
6 leave the vessel on that day?

7 A. Yes, the following -- in the morning.

8 Q. And that would be April 22nd?

9 A. Yes, sir.

10 Q. All right.

11 As part of your leaving the vessels, working for Vane
12 Line, did they have a practice where you were supposed to sign
13 off on a separation agreement?

14 A. Yes, there's --

15 Q. Yes?

16 A. Yes, sir.

17 Q. All right.

18 MR. HOFMANN: Let me offer Trial Exhibit 8.

19 THE COURT: Any objection?

20 MR. FORDE: No objection, your Honor.

21 Q. Is this a copy --

22 THE COURT: Plaintiff's Exhibit 8 is admitted.

23 (Plaintiff's Exhibit 8 received in evidence)

24 MR. HOFMANN: I'm sorry, your Honor, for stepping on
25 you.

C94VHIC5

Hicks - direct

1 Q. Do you recognize this as being the separation agreement
2 that -- for your leaving the vessel on April 22nd?

3 A. Yes, I did.

4 Q. Now, in general, what is -- what information is put into
5 the separation agreement?

6 A. It says: Any injuries or illnesses upon boarding, yes or
7 no. The crew signs it; you initial it; you print your name.
8 Actually, the captain prints your name out. You put your date,
9 no, whether you came home with the flu or a cold or anything.

10 Q. Hold on, Mr. Hicks.

11 A. I'm sorry.

12 Q. Does it give the dates that you sailed on the vessel?

13 A. The --

14 Q. Does it give the dates?

15 A. Yes, it does.

16 Q. Does everybody sign this when they leave the vessel?

17 A. Yes.

18 Q. Now, with respect to -- you said it has a section for if
19 you have an injury to make a report; is that correct?

20 A. Yes.

21 Q. Did you make a report in the separation agreement?

22 A. Yes.

23 Q. Could you read to the jury what you wrote, read it verbatim
24 please.

25 A. Okay.

C94VHIC5

Hicks - direct

1 Read on the top also what it says to do? That's what
2 you just did before.

3 Q. Yes, you can do that. That would be good.

4 A. All right.

5 If the answer is yes to any of the questions, please
6 explain here, okay.

7 Pulled doughnut up on Texas bar and hurt right arm --
8 right shoulder.

9 Q. Is that what you wrote?

10 A. Yes, I did.

11 Q. All right.

12 Did you then leave the vessel?

13 A. Yes, that morning.

14 Q. And do you remember what time you left the vessel?

15 A. I have to be honest with you, no. It was some time early
16 morning, because Bruce --

17 Q. That's fine.

18 Where was the vessel actually sitting when you left
19 the vessel?

20 A. We were sitting at anchorage.

21 Q. So how did you get off the vessel?

22 A. They send a launch boat out. There's a little marina next
23 to Yorktown Heights Refinery Western. They bring the other
24 crew out, they board, we put our gear on the little boat, and
25 get brought back into the shoreline.

C94VHIC5

Hicks - direct

1 Q. Did you require assistance in order to get off the vessel?

2 A. Yes.

3 Q. Tell us what assistance you required.

4 A. I couldn't carry my bags. I had my computer bag and my big
5 duffle bag. Vinny and Glenn were very nice, grabbed both items
6 and helped me onto the small boat to get into the dock.

7 Q. And then this is Yorktown, Virginia; correct?

8 A. Yes, sir.

9 Q. Where were you ultimately traveling to?

10 A. Back to Philadelphia.

11 Q. How were you going to get to Philadelphia?

12 A. Vane had sent a car rental company, which is a big van that
13 we all pile in and get driven back to Philly.

14 Q. Did you take that van ride back to Philadelphia?

15 A. Yes.

16 Q. Now, while you were in the van, did you have -- did you
17 have a conversation with the Vane office regarding the injury
18 suffered by you on the vessel?

19 A. Yeah, Marge Lucas had called me cell phone.

20 Q. Who is Marge Lucas?

21 A. She's in charge of the operation of the tugs. I guess
22 makes sure crews get on, monies, a bunch of stuff. Exactly
23 what she does there, I really don't know.

24 Q. What was the sum and substance of the conversation?

25 A. She had read the report, and had said to me that, You had

C94VHIC5

Hicks - direct

1 gotten hurt on the vessel. She said, Why didn't you give me a
2 call right away; we could have sent you to doctors right down
3 here.

4 And I said, No, I want to go home. I just want to get
5 home. That's all I want to do.

6 Q. And did she agree to allow you to go home to see a doctor?

7 A. Yes.

8 Q. Did you have a doctor in mind that you wanted to see?

9 A. I wanted to see Dr. Murphy. He's an orthopedic doctor.

10 Q. How did you know Dr. Murphy?

11 A. He put a replacement knee in me in 2003, I believe it was.

12 Q. So he was an orthopedist you were familiar with?

13 A. Yeah.

14 Q. Did you ultimately get to New Jersey and have an
15 appointment with Dr. Murphy?

16 A. Yes, I did.

17 Q. And when was that?

18 A. On the 23rd of April. I called him up that morning, when I
19 had gotten home. And he said he couldn't see me then. The
20 fastest he could get to me was the 23rd.

21 Q. Now, before we get to that --

22 THE COURT: What was the date? You said you called
23 him on the 23rd, and then he said the fastest he could get to
24 you was when?

25 THE WITNESS: I mean I called him when I got home that

C94VHIC5

Hicks - direct

1 morning, the 22nd. And he said the fastest I could get you is
2 tomorrow morning on the 23rd.

3 THE COURT: Okay.

4 BY MR. HOFMANN:

5 Q. Now, with respect to the incident and reporting --

6 MR. HOFMANN: Plaintiff offers Trial Exhibit 10 and
7 11.

8 MR. FORDE: No objection, your Honor.

9 THE COURT: All right.

10 Plaintiff's Exhibit 10 and Plaintiff's Exhibit 11
11 admitted.

12 (Plaintiff's Exhibits 10, 11 received in evidence)

13 MR. HOFMANN: Your Honor, if I may -- very short, if I
14 may just read --

15 THE COURT: Yes.

16 MR. HOFMANN: Exhibit 10 is an email from B. L.
17 Comiskey. Subject to connection. That's Bruce Comiskey, your
18 Honor. And it's to Ed Fitchet.

19 Who's Ed Fitchet?

20 A. He was the port captain.

21 Q. It says: Captain Ed, while aboard Patriot Tuesday night,
22 4/21/09, Mate C. Hicks reported on boarding form a shoulder
23 injury. When instructed -- when I instructed him to fill out
24 the incident report, Mr. Hicks said he didn't -- quote, he did
25 not want to make a big deal about it, end quote. He had put

C94VHIC5

Hicks - direct

1 some ice on it and, quote, did not see -- did not need to go to
2 a doctor, end quote. I did not see what he was doing to
3 sustain the injury. Signed, B. E. Comiskey, Captain, Patriot.

4 Exhibit Trial 11 is from an entity known as
5 safetyincidents@vanebrothers.com to a whole list of
6 individuals. And it says: Incident type, injury. It says:
7 An incident was reported that occurred at 4/21/2009. It said
8 it was submitted by Vane. And then it says, K. Shaner.

9 And then it says: On 4/21, Mate Charles Hicks injured
10 his right shoulder while pushing up on the tow wire doughnut.
11 He refused medical at the time. After speaking with his doctor
12 at home, he then contacted the office to report the injury.

13 MR. HOFMANN: That's the important stuff I wanted to
14 read, your Honor.

15 Q. All right.

16 Did you get to see Dr. Murphy?

17 A. Yes, I did.

18 Q. All right.

19 And did you tell Dr. Murphy what happened?

20 A. I explained to him what happened.

21 Q. All right.

22 Did you ask him for medical treatment?

23 A. Yes. I asked him if he could please do me a favor and give
24 me a shot in the shoulder. And I said would that help. I
25 believe they call it cortisone.

C94VHIC5

Hicks - direct

1 Q. Did you receive a shot in the shoulder?

2 A. Yes. He gave me a shot in the shoulder.

3 Q. Did you have a discussion with him with respect to your
4 being either fit for duty or not fit for duty?

5 A. I had said to him, Dr. Murphy, can you please give me a
6 fit-for-duty slip.

7 He said, Well, I'll tell you what. I'll give it to
8 you under one condition: If you're not good in two weeks, you
9 got to come back to me and let me know what's going on.

10 (Continued on next page)

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C94rhc6

Hicks - direct

1 Q. What was the reason why you asked for the fit for duty
2 slip?

3 A. Honestly, I was petrified of losing my job. I just wanted
4 to go back to work. I really didn't know what was wrong with
5 me at the time, but I figured -- I was praying it would just go
6 away.

7 Q. Did you get the fit for duty slip from the doctor?

8 A. Yes, I did.

9 Q. What did you do with it?

10 A. I came home. The first thing I did was I faxed it off to
11 Marge Lucas, the office personnel at Vane Brothers in
12 Baltimore, Maryland. She received that, and I said, OK, I'm
13 great, I'd be willing to go back to work in two weeks' time.
14 She said OK, fine. She said, but before you come back to work,
15 you got to go to our doctor.

16 Q. Did she tell you who her doctor was?

17 A. She made an appointment with Concentra in Jersey, where I
18 live.

19 Q. The same Concentra that did the physical examination before
20 you started working?

21 A. Yes, sir.

22 Q. Did you go to an appointment at Concentra?

23 A. Yes, I did.

24 Q. Do you recall when that was?

25 A. It was just before -- I think it was on a Tuesday, just

C94rhc6

Hicks - direct

1 before I would leave for, Wednesday morning, Philadelphia.

2 Q. Did you see a doctor at Concentra?

3 A. Yes, I did.

4 Q. Did you discuss with the doctor who had happened?

5 A. I explained to him -- well, Marjorie had a whole --

6 Q. I'm just asking --

7 A. Yes, I explained to him what happened.

8 Q. Did you tell him where you had pain?

9 A. Yes.

10 Q. Did you have pain at that time?

11 A. Yes.

12 Q. Where were you having pain?

13 A. In the shoulder joint area, right here.

14 Q. Did that doctor do an examination of you?

15 A. Yes.

16 Q. What did the doctor say to you or do for you with respect
17 to your duty slip or duty status? Were you fit for duty or not
18 fit for duty?

19 A. He said he wouldn't authorize me to go back to work. I
20 pleaded with him. He said no.

21 Q. Did he recommend that you receive some sort of examination
22 or treatment?

23 A. He said that I really think you need to get an MR -- he
24 said, did you have an x-ray? I said yes. He said, I really
25 think you need an MRI here, there's something more than a

C94rhc6

Hicks - direct

1 sprained muscle, what you are telling me you have.

2 MR. HOFMANN: Your Honor, I will point out some of
3 those medical records are already in evidence, but we don't
4 need them.

5 THE COURT: All right. The initial Concentra was in.

6 MR. HOFMANN: That also has the medical records
7 attached to it for this examination.

8 MR. FORDE: OK.

9 Q. Did you then return to Dr. Murphy after you saw the doctor
10 at Concentra?

11 A. I returned to Dr. Murphy. He examined me again and said
12 you need to see Dr. Lisser, our shoulder specialist.

13 Q. Did he have you see Dr. Lisser?

14 A. Yes. Then I went back and I seen Dr. Lisser. He examined
15 me and he said, look, you've got to get an MRI, that's the only
16 way we're going to see what's going on here.

17 Q. Did Dr. Lisser request authorization from Vane to have the
18 MRI done on your shoulder?

19 A. Yes.

20 Q. Was an MRI actually done?

21 A. Yes, it was.

22 Q. When was the MRI?

23 A. That was on the 21st, I believe.

24 Q. Of May?

25 A. June.

C94rhc6

Hicks - direct

1 Q. Of May?

2 A. May, I'm sorry.

3 Q. When was the MRI?

4 A. I believe it was on the 21st or the 23rd. I'm not a
5 hundred percent sure on that.

6 Q. Of which month?

7 A. Of May, sir.

8 Q. Did you go back to see Dr. Lisser after the MRI was
9 performed?

10 A. Yes, the following day.

11 Q. Did he review the MRI with you?

12 A. Yes. He showed me on the --

13 Q. Did he review it with you?

14 A. Yes, he did.

15 Q. What did he recommend as far as treatment thereafter?

16 A. He said that you need surgery.

17 Q. Did he seek approval from Vane Brothers, Vane Line
18 Bunkering, to have surgery performed on your right shoulder?

19 MR. FORDE: Objection.

20 THE COURT: Was the surgery performed.

21 Q. Was surgery performed?

22 A. Yes, it was.

23 THE COURT: To the best of your understanding, did
24 Vane approve that surgery?

25 THE WITNESS: Yes.

C94rhc6

Hicks - direct

1 Q. Before surgery was performed, did you receive a letter from
2 Vane Line advising you about certain benefits to which you
3 would be entitled?

4 A. Yes.

5 MR. HOFMANN: Your Honor, I offer Plaintiff's Trial
6 Exhibit 34.

7 MR. FORDE: No objection, your Honor.

8 THE COURT: All right. Plaintiff's Exhibit 34
9 admitted.

10 (Plaintiff's Exhibit 34 received in evidence)

11 Q. I show you Exhibit 34. Is the letter you received from
12 Vane outlining certain benefits which Vane Line was willing to
13 pay you?

14 A. Yes, I did.

15 Q. Did Vane Line tell you that they were going to pay you a
16 certain amount of money for maintenance?

17 A. Yes.

18 Q. How much money did they say they would pay you on a daily
19 basis?

20 A. \$15 a day.

21 Q. Did Vane Brothers tell you that they were willing to
22 provide for your medical care until you were at maximum medical
23 improvement?

24 A. Yes, they did.

25 Q. Did Vane Brothers also offer to provide you for an

C94rhc6

Hicks - direct

1 unspecified period of time additional money to compensate you
2 for lost wages?

3 A. They didn't have a specified time.

4 Q. But did they offer to provide you some money as
5 compensation for lost wages?

6 A. Yes, they did.

7 Q. Was that about \$3500 per month?

8 A. 3512 a month.

9 Q. Were you requested to provide a more thorough accident
10 report to Vane Brothers or Vane Line Bunkering?

11 A. Yes.

12 Q. Did you do so?

13 A. Yes, I did.

14 Q. Who requested it of you?

15 A. Marge Lucas.

16 MR. HOFMANN: Let me offer into evidence Trial Exhibit
17 12.

18 THE COURT: Any objection?

19 MR. FORDE: No objection, your Honor.

20 THE COURT: Plaintiff's Exhibit 12 admitted.

21 (Plaintiff's Exhibit 12 received in evidence)

22 Q. Is this your accident report that you provided to Vane?

23 A. Yes, it is.

24 Q. When did you provide that to Vane?

25 A. On 6/28.

C94rhhic6

Hicks - direct

1 Q. June 28, 2009?

2 A. Yes, sir.

3 Q. Did you actually or ultimately have surgery on your
4 shoulder?

5 A. Yes, I did, sir.

6 Q. What was the date of the surgery on your shoulder?

7 A. July 1, 2009.

8 Q. Where was that surgery performed?

9 A. Riverview Hospital in Red Bank, New Jersey.

10 Q. Before you had the surgery, what physical symptoms or
11 problems were you experiencing?

12 A. I had a lot of discomfort and pain in my right shoulder. I
13 couldn't use the arm at that point. I had gotten -- well,
14 couldn't use was after then. I had a lot of discomfort and
15 pain. What they did was --

16 Q. Were there certain motions that you could or had difficulty
17 doing?

18 A. Yes. Raising my arm above my head, doing any heavy lifting
19 or any of that nature.

20 Q. Who did the surgery on your arm on July 1, 2009?

21 A. Dr. Lissner.

22 Q. Tell the jury how your arm felt when you came out of
23 surgery and the first day or so after.

24 A. I was in a lot of discomfort and pain. They had put a pain
25 pump on me, a liquid with a needle going into my arm. I went

C94rhc6

Hicks - direct

1 home that night and I suffered all through the night. We
2 called the doctors. We couldn't get ahold of them. At 5:00 in
3 the morning my wife drove me to the emergency room to see what
4 they could do for me.

5 Q. Was anything done for you when you were at the emergency
6 room?

7 A. Yes. They had to bring me into a room, and a
8 anesthesiologist that originally put the pump in came back
9 down. The needle wasn't in -- it came out of the right spot.
10 It was fun. They redid it again there. So I had the thing for
11 five days. I was as numb as could be.

12 Q. In the first few days after the needle and pump was
13 removed, tell the jury how your arm felt during that period of
14 time.

15 A. I was still in a lot of discomfort at that point. They had
16 given me pain medication to tolerate the pain.

17 Q. Did you return to see Dr. Lisser for further treatment and
18 follow-up?

19 A. Yes. I went to see him. He looked at the shoulder, pulled
20 the bandages off, and then said, you're going to have to come
21 back. He gave me another date to come back which was like
22 another two weeks. In return, I went home.

23 Q. In total, approximately how many times did you see Dr.
24 Lisser in follow-up?

25 A. About ten times, roughly.

C94rhc6

Hicks - direct

1 Q. Did Dr. Lisser prescribe for you any treatments to help you
2 recuperate from your shoulder surgery?

3 A. He sent me up after six weeks or eight weeks to the therapy
4 center up above his office. They have a big company there.

5 Q. Physical therapy?

6 A. Yes, physical therapy.

7 Q. He prescribed that to you, correct?

8 A. Yes, sir.

9 Q. Did you go to the physical therapy center to get physical
10 therapy treatment?

11 A. Yes, I did.

12 Q. Would you tell the jury what the physical therapy
13 treatments were that you were prescribed.

14 A. The first week it was just warm and cold compresses and two
15 big bandages. They vibrate your arm, a stimulus machine. They
16 did that. And the physical therapist talked to me, asked me
17 what my occupation was and what he had to do to get me back in
18 shape for work itself.

19 Q. What physical therapy did they start having you do?

20 A. Walk up a wall with my fingers, take a rubber band and
21 stretching. Well, he stretched the arm, I didn't. He was
22 stretching it back and forth to get it loose enough to work
23 with. Then they put me on a machine to rotate with your hands,
24 like a bicycle but for the upper end. I did that. It had some
25 motion to it. You didn't really push it. The machine kind of

C94rhc6

Hicks - direct

1 helped you until you got maneuvering with it.

2 Q. How often were you prescribed to go to the physical therapy
3 center for Dr. Lisser?

4 A. About three times a week.

5 Q. Were you also prescribed home physical therapy?

6 A. Yes.

7 Q. What was the home physical therapy that you were prescribed
8 to do?

9 A. Basically the same thing I was doing there less the
10 stimulus machine and less the bicycle. They gave me a rubber
11 band and gave me a set of charts to follow the procedure on how
12 to do the exercise.

13 Q. You said you were given a band. Were you given a band to
14 do some exercises?

15 A. Yes, a big rubber band. That was the one.

16 Q. Did you bring this from home?

17 A. Yes, I did.

18 Q. Is this what was given to you?

19 A. Yes.

20 Q. Could you show the jury what exercises you were told to do
21 at home with this and how to do so.

22 A. There is not a doorknob here.

23 Q. Just describe it.

24 A. You put this around a doorknob and then you stretch your
25 arm out like ten times and then you bring it in. You do curls

C94rhhic6

Hicks - direct

1 with it to strengthen the muscle here and here. You do that
2 about ten times. Then a little bit more tension. You put it
3 on your foot and you do that. Then behind you, you try to -- a
4 broom handle, try to raise the broom behind you a couple of
5 times, like ten times, five or ten times.

6 Also take a hot shower and rotate your arm. That I
7 had to do, I didn't have a big enough hot water tank, at least
8 30 minutes. You had to rotate it in a circle constantly, just
9 maneuvering. It would just dangle, no muscle pressure.

10 THE COURT: How good were you about doing all of those
11 exercises? Some people with physical therapy, they get
12 prescribed to do home physical therapy and don't really do it.
13 Some people are really methodical about it, some people are in
14 between. How would you describe yourself?

15 THE WITNESS: You're not married to her. It was twice
16 a day. My wife insisted on the fact that I do it. She came to
17 me with physical therapy. He said twice a day, don't kill
18 yourself, but try to do it as much as you possibly can to get
19 yourself back in working order.

20 Q. Did there come a time when you spoke to the physical
21 therapist and told him or her that you needed to return to work
22 and that you might be missing physical therapy sessions?

23 A. Yes.

24 Q. Approximately when was that?

25 A. I went up to --

C94rhc6

Hicks - direct

1 Q. When was that?

2 A. That was in June, when I received --

3 Q. June? You had surgery in July.

4 A. In July rather. I'm sorry. It was like around September
5 or so we went into -- I had asked, could we please go in a
6 private room so I could talk to him. I said, look, I'm in deep
7 financial problems right now, is there any possible way -- I
8 can't make these things. I got an opportunity to make a couple
9 of bucks. Is there any possible way you can give me all the
10 instruction sheets and what I got to do, what I can do? He
11 said, yeah. He said, I'll help you out with that. So, he gave
12 me the instruction sheets. He gave me this stuff to take home.
13 We went back and did the therapy.

14 Q. Let me show you, and it's not been marked yet --

15 MR. HOFMANN: Your Honor, by way of explanation, it's
16 part of another exhibit that is marked and that is agreed to be
17 admissible.

18 MR. FORDE: No objection, your Honor.

19 THE COURT: What number is it?

20 MR. HOFMANN: I'm going to mark this as Plaintiff's
21 Exhibit 61.

22 THE COURT: Why don't you identify it for the record.

23 MR. HOFMANN: I'll identify it and then ask him about
24 it. It's four pages of physical therapy instructions. I'm
25 going to ask him are these the instructions he received.

C94rhc6

Hicks - direct

1 THE COURT: You have offered it and Mr. Forde has no
2 objection to it?

3 MR. FORDE: No objection.

4 THE COURT: All right. Exhibit 61 admitted.

5 (Plaintiff's Exhibit 61 received in evidence)

6 Q. Let me show you Exhibit 61. Take a look at this, Mr.
7 Hicks. Can you tell us what those four pages are?

8 A. These are the exercises that he had showed me how to do. I
9 did them in his office and he marked off the ones that he
10 wanted me to do and how many times. He said, do what you can
11 tolerate to do to a point. Don't overdo it, but do everything
12 that you have to do here as much as you can do.

13 Q. Are these the exercises you were doing twice a day?

14 A. Yes, it is.

15 Q. We are going to get into more details about going to work.
16 You did get some work in 2009?

17 A. Yes, I did.

18 Q. While you were still under Dr. Lisser's treatment, correct?

19 A. Yes, I did.

20 Q. When you were at work, were you working on boats?

21 A. Yes.

22 Q. What would you do with respect to your physical therapy?

23 A. I continued to do it.

24 Q. Where and how?

25 A. In our engine room we had a weight bench, a bicycle, a

C94rhc6

Hicks - direct

1 treadmill, and an area where you can do exercises. A lot of
2 the guys would go down there.

3 Q. Did you bring your band with you?

4 A. Yes, I went down and did the exercises with the band and
5 some bicycling.

6 Q. Did you work in 2010 as well while still under Dr. Lisser's
7 care?

8 A. I had to. Yes.

9 Q. While you worked during 2010, before June of 2010, did you
10 continue, while working on the boats, to do your exercises?

11 A. Yes, I did.

12 Q. Do you recall seeing Dr. Lisser in December of 2009?

13 A. Yes.

14 Q. What complaints, physical complaints, did you give to him
15 at that time?

16 A. I had told him that I was still having a problem with the
17 shoulder. I said, look, obviously there's something not right.
18 He said let me -- go ahead. Sorry.

19 Q. Tell me what complaints you had to Dr. Lisser?

20 A. I couldn't lift my arm over my shoulder-chest area.

21 Q. Tell me what happened if you did or if you tried?

22 A. I'd get a lot of pain and I could feel the joint itself
23 crack.

24 Q. What did he prescribe to you to do?

25 A. He said do whatever -- no more than 10 pounds you can lift,

C94rhhic6

Hicks - direct

1 he says, if you can tolerate it. Do whatever you can possibly
2 tolerate, and that's what I did.

3 Q. Did you see Dr. Lisser? Did he continue you on physical
4 therapy?

5 A. Yes.

6 Q. Did you see Dr. Lisser again in January of 2010?

7 A. Yes.

8 Q. What were your complaints to him about your physical
9 condition at that time?

10 A. Same thing. My shoulder, I wasn't able to lift it, and I
11 had explained to him. And he had felt that something was going
12 on, obviously, at this point.

13 Q. Did he recommend that you continue with physical therapy?

14 A. Yes. He said continue doing the stretches, whatever you
15 can tolerate to do, try to strengthen it.

16 Q. Did you see Dr. Lisser again in April of 2010?

17 A. Yes, I did.

18 Q. At that time what were your complaints?

19 A. I still had the crackling in the one joint and I couldn't
20 go above this point in my head.

21 Q. Were you suffering from any feelings of pain?

22 A. Yes.

23 Q. When would you experience pain?

24 A. When I would get it above my shoulder area.

25 Q. Let's turn to the period about seven months, eight months

C94rhhic6

Hicks - direct

1 after your surgery, in the spring of 2010.

2 A. Yes.

3 Q. You still owned your house in Middletown?

4 A. Yes.

5 Q. Did you do any work around the house?

6 A. I putzed around doing what I would tolerate. I planted a
7 shrub.

8 Q. You recall doing that one day, right?

9 A. Yes.

10 Q. What was the shrub, do you recall?

11 A. It was a Christmas tree we had gotten in, I'm embarrassed
12 to say this, December and we were going to plant it outside. I
13 finally got around to it back then.

14 Q. What did you do with respect to planting this tree?

15 A. My son Stephen, he went outside. There was a tree there.
16 He took that one out and he redug the hole for me. At that
17 particular point he brought the tree over to the hole site.
18 What I did was I had put the tree down into the hole right
19 there.

20 Well, before I did that, I should say there was dirt,
21 some dirt and some mulch that was right around that area. My
22 grandson Charles was helping me out, dig the hole, as you will
23 see on the video. We were taking out dirt, doing that
24 together. Then I put the tree down into the hole, and then I
25 buried it with the dirt again.

C94rhc6

Hicks - direct

1 Q. What tools did you use?

2 A. I had a spade shovel, a long spade shovel.

3 Q. Can you describe the movements that you recall you made
4 with the shovel.

5 A. Yes. It was like this, digging the hole. I was doing this
6 as I was taking it. I was pushing the dirt out that was left
7 in the hole (indicating).

8 Q. Did these motions cause you any extreme pain?

9 A. No. It was really tolerable on my lower end. As long as I
10 stay in that area, I'm fine.

11 Q. Were the motions you were doing similar to the motions you
12 were doing while you did physical therapy?

13 A. Yes.

14 MR. FORDE: Your Honor, could we take down the board?

15 THE COURT: All right, so McGinis can have a clear
16 line of sight.

17 Q. Is it correct that you did the planting of that little
18 Christmas tree on April 15, 2010?

19 A. Yes.

20 Q. On April 26, 2010, did you see Dr. Lisser again?

21 A. Yes.

22 Q. At that time what were your complaints?

23 A. Still had the same problem. I wasn't able to go over my
24 chest area. Like I can bring my arm right up to there, that's
25 where. Then if you could feel this, if you feel it -- they are

C94rhhic6

Hicks - direct

1 welcome to feel it -- I still have the tear.

2 MR. HOFMANN: Indicating on the record that Mr. Hicks
3 raised his arm somewhat to the right side.

4 Q. You showed Dr. Lisser this problem?

5 A. Yes, I did.

6 Q. Did Dr. Lisser at that point recommend you have any further
7 testing?

8 A. He said that I think we need to look into this with an MRI.

9 Q. That was at the visit of April 26th, correct?

10 A. Yes, sir.

11 THE COURT: Mr. Hofmann, in about three or four
12 minutes we will take our afternoon break, our mid-afternoon
13 break, to give you a runway for that.

14 MR. HOFMANN: It may be a better time right now,
15 Judge.

16 THE COURT: Ladies and gentlemen of the jury, we will
17 take a short break again now, stretch our legs. When we come
18 back in about seven minutes or so, we'll go straight through
19 till 5:00, and then we will end promptly at 5 o'clock today for
20 the day. Again, remember not to talk to each other about
21 anything you have heard or anyone else.

22 THE CLERK: All rise as the jury leaves.

23 (Jury not present)

24 THE COURT: Before we take our own break, is there
25 anything that anyone would like to raise?

C94rhc6

Hicks - direct

1 MR. HOFMANN: No, your Honor.

2 MR. FORDE: No.

3 THE COURT: Let's take a five-minute break.

4 (Recess)

5 (Jury present)

6 THE COURT: Mr. Hofmann, you may continue.

7 MR. HOFMANN: Thank you, your Honor.

8 BY MR. HOFMANN:

9 Q. Where we last left off, we were talking about the April 26,
10 2010, visit to Dr. Lisser.

11 A. Yes, sir.

12 Q. You indicated, I believe, that he had recommended an MRI
13 for your right shoulder, correct?

14 A. Yes, sir.

15 Q. Did Dr. Lisser, to your knowledge, request authorization
16 for that MRI from Vane?

17 A. Yes, he did.

18 Q. Did Vane give the authorization?

19 A. No, they refused.

20 Q. Did something intervene to -- withdrawn. Did there come a
21 time after the April 26, 2010, visit with Dr. Lisser that Dr.
22 Lisser told you that he would no longer continue to treat you?

23 A. Yes.

24 Q. Did there come a time after that April 26th visit that Vane
25 Brothers or Vane Line Bunkering advised you that they were no

C94rhhic6

Hicks - direct

1 longer going to provide you with maintenance and cure?

2 A. Yes.

3 MR. HOFMANN: I'm going to offer Plaintiff's Trial
4 Exhibit 41.

5 MR. FORDE: No objection, your Honor.

6 THE COURT: Plaintiff's Exhibit 41 admitted.

7 (Plaintiff's Exhibit 41 received in evidence)

8 Q. Showing you a letter dated May 13, 2010, Trial Exhibit 41,
9 is this a letter that Vane Brothers/Vane Line Bunkering
10 provided you advising you that they were no longer authorizing
11 medical treatment?

12 A. Yes.

13 Q. Did they also tell you that they were stopping the \$15 a
14 day maintenance?

15 A. Yes, sir.

16 Q. Charles, you can put it down. Did you have a conversation
17 with Dr. Lisser in June of 2010 in which he advised you that he
18 was no longer going to treat you?

19 A. Yes.

20 Q. Did Dr. Lisser tell you what was the reason for that?

21 A. Vane had sent them a video of me planting the shrubbery in
22 my yard. Myself, people from Vane, and Dr. Lisser were
23 supposed to be -- I'm sorry.

24 Q. You said that Vane sent the video to Dr. Lisser?

25 A. Yes, sir.

C94rhc6

Hicks - direct

1 Q. I'm asking about the conversation you had with Dr. Lisser.
2 What did Dr. Lisser say to you?

3 A. He told me that I'm cutting you off because they ain't
4 going to pay for nothing, so there's no way I'm going to
5 continue on to treat you.

6 Q. Did he tell you that in his opinion he thought that you
7 could perform the work of a tugboat mate for Vane?

8 A. Yes.

9 Q. In the letter that was provided to you of May 13th,
10 attached to it was an orthopedic note from Dr. Lisser telling
11 you that he had reviewed the video and a job analysis, physical
12 capacity/physical requirements analysis that had been provided
13 to him, is that correct?

14 A. Yes, sir.

15 Q. I'm going to review some of the things on here. First of
16 all, was that analysis provided to you as part of this letter?

17 A. Yes, it was.

18 Q. This job analysis indicates that in your work as a tugboat
19 mate, you never pick up objects more than 21 pounds. Is that
20 accurate as far as a physical description of the duties you
21 have as a mate?

22 A. No.

23 Q. Tell us, tell the jury, what jobs you do in which in the
24 routine of your activities you would pick up weights 21 pounds
25 or more.

C94rhhic6

Hicks - direct

1 A. At the beginning of every tour we get groceries, grub. We
2 have to bring that aboard. That's maybe 20 cases of water,
3 cases of milk, meat. It just goes on and on. Then we have to
4 put on 25-gallon pails of oil, hydraulic oil. If you need
5 lines, you order them. You have to pull them on board on the
6 dock.

7 Cables, you always have to have a spare set of cables.
8 Shackles wear out. You have to get shackles, engine parts.
9 Everybody pitches in. Nobody's above anything at that
10 particular point. Everybody pitches in to bring the supplies
11 on the vessel.

12 There's times that the barge is 40 feet in the air,
13 the deckhand is on the lower deck, he's trying to maintain
14 getting a line up. He's got to pass the line to me. I got to
15 throw the line to the barge itself because he's got to stay
16 there to tie it off right away.

17 Q. How much do the lines weigh that you may have to handle?

18 A. Pulling them up, they could be roughly anywhere from 60 to
19 80 pounds on deadweight. That's as long as they're not wet.

20 Q. What about the other things you have to carry? What about
21 hooking up the towing gear?

22 A. You have to hook up the towing shackle. That's about this
23 big with a 2-inch pin in it. That thing roughly weighs up to
24 80 to a hundred pounds that has to be lifted. The toe end, you
25 also have to lift that up with the cable to pull that and get

C94rhc6

Hicks - direct

1 it in position.

2 Q. Would you have to carry weights of more than 21 pounds?

3 A. Yes, sir.

4 Q. Explain in what circumstances you would have to carry
5 weights of more than 21 pounds.

6 A. You would have to assist out and help with the shackles.
7 You would have to go to the towing machine, whatever shackle
8 you're going to use to tow, you have to grab that. You have to
9 grab the cables and the wire, pull that to you and try to
10 shackle all this together. You have to put cables up on the
11 barge.

12 Q. This job analysis says that you would never have to carry
13 something 21 pounds or more. Is that accurate?

14 A. No.

15 MR. HOFMANN: Your Honor, it's in evidence, and I will
16 point out that there is nothing on here about climbing ladders.

17 Q. Do you have to climb ladders? You already described how
18 often you have to climb a ladder, right?

19 A. Yes, sir.

20 Q. Did you attempt to discuss with Dr. Lisser his decision to
21 stop treating you?

22 A. Yes.

23 Q. Did you tell him about the work you do as a mate on the
24 vessels?

25 A. Yes.

C94rhc6

Hicks - direct

1 Q. What was his response?

2 A. He said, well, they told me that the max that you would
3 have to pick up is 10 pounds, it would be rare for you to even
4 do that. I said, Dr. Lisser, that's not true. There's times I
5 have to -- somebody falls over who weighs 200 pounds, who's
6 going to grab him right away? It depends on who's on watch to
7 see it. I tried to explain all of this to him, what our
8 physical duties are as a mate.

9 Q. His response was?

10 A. I'm not getting in the middle of this between you and Vane.
11 They stopped treatment, they ain't going to pay me no more, and
12 that's the end of it, that's all I could tell you.

13 Q. Did there come a time when Vane, because you had suffered
14 the shoulder injury, terminated your employment with that
15 company?

16 A. Yes.

17 MR. HOFMANN: Your Honor, I offer Plaintiff's Trial
18 Exhibit 33.

19 MR. FORDE: No objection, your Honor.

20 THE COURT: Plaintiff's Exhibit 33 admitted.

21 (Plaintiff's Exhibit 33 received in evidence)

22 Q. This letter was sent to you on July 24, 2009, correct?

23 A. Yes, sir.

24 Q. This is only three weeks after you have had the surgery,
25 right?

C94rhc6

Hicks - direct

1 A. Yes, sir.

2 Q. Come September, October, November of 2009, Charles, what
3 was your financial condition?

4 A. I was in foreclosure proceedings.

5 Q. Can you tell the jury what were your monthly expenses for
6 your mortgage and your household upkeep? First of all, I'll
7 ask you this. What was your mortgage payment at the time?

8 A. It was 4200. That was including the taxes and the
9 insurance.

10 Q. You had utility payments that you had to make, right?

11 A. Yes, sir.

12 MR. FORDE: Objection, your Honor.

13 THE COURT: Overruled.

14 Q. What was your average monthly sewer bill?

15 A. Roughly I believe it was around 23 something and change.

16 THE COURT: Maybe you can add them all together.

17 MR. HOFMANN: I will.

18 Q. I can help by saying did you have sewer, water, electric,
19 and trash bills?

20 A. Yes, I did.

21 Q. In total were the utility bills approximately \$867 a month
22 on average?

23 A. Yes, they were.

24 Q. Were your mortgage plus utilities about \$5,060 per month?

25 A. Yes, thereabouts.

C94rhhic6

Hicks - direct

1 Q. You had your two sons living with you, so you were
2 responsible for one-third of each, right?

3 A. Yes, sir.

4 Q. Your portion of the bills would be about \$1690 a month,
5 correct?

6 A. Yes, sir.

7 Q. How much would you estimate, based on when you went
8 shopping for food, was your food cost per week?

9 A. I would say roughly about on an average of 200, between 100
10 to 200.

11 Q. I'm just talking about for yourself now. I'm not talking
12 about for the rest of the family.

13 A. I would say roughly around a hundred.

14 Q. So about 400 a month?

15 A. Yeah, about \$400 a month.

16 Q. In addition to the 1690, your expenses were about 2,090 a
17 month?

18 A. Yes, sir.

19 Q. When you received that letter from Vane, what happened to
20 the offer from Vane to pay you that \$3512 a month?

21 A. They had stopped it.

22 Q. After how many months?

23 A. They only gave it to me for three months.

24 Q. That was it, right?

25 A. Correct.

C94rhc6

Hicks - direct

1 Q. Did they continue to pay you the \$15 a day for a period of
2 time?

3 A. Yes, sir.

4 Q. That was until that may date, May 2010, in the letter?

5 A. Yes, sir.

6 Q. You were in foreclosure, they cut off these benefits. What
7 did you decide you had to do for you and your family?

8 A. At this point I had no alternative but to seek work.

9 Q. In the year 2009 did you work?

10 A. Yes, I did.

11 Q. In the tugboat industry?

12 A. Yes, I did.

13 Q. In total approximately how many weeks did you work in 2009?

14 A. I think it was just a couple of weeks in 2009.

15 Q. What income did you earn, approximately, from working in
16 2009 after your surgery?

17 A. It was about 7,000 and change.

18 Q. Who did you work for, do you recall?

19 A. Miavondi, and I worked for Village Dock and also Great
20 Lakes.

21 Q. Did you work for Donjon Witte?

22 A. Yes, I did, also Donjon.

23 Q. Did you work for KT Marine a couple of days?

24 A. Yes.

25 Q. In 2010 were you still in the same financial boat?

C94rhc6

Hicks - direct

1 A. Yes.

2 Q. To use a bad metaphor. Did you work in 2010, prior to June
3 of 2010, when Dr. Lisser told you he wouldn't treat you?

4 A. Did I work prior to?

5 Q. From January 1, 2010, until June of 2010, did you work?

6 A. Yes.

7 Q. For whom?

8 A. I worked for Great Lakes.

9 Q. What kind of job were you doing for Great Lakes?

10 A. I was down in -- they were doing a dredging job down in Sea
11 Isle City -- towing barges. Actually, being honest with you, I
12 was on the fire watch.

13 Q. What is a fire watch? What does that mean?

14 A. Somebody's got to be up to maintain and secure that the
15 boat is safe. So I worked from 12:00 midnight to 7:00 in the
16 morning.

17 Q. Was the dredging operation going on during those hours?

18 A. No.

19 Q. Did you have to climb ladders or do any of the physical
20 labor for Great Lakes that you were doing for Vane Brothers?

21 A. No, not at all. I was just doing a fire watch tour there.

22 Q. Did you work for other employers in the year 2010 after
23 June of 2010?

24 A. Yes.

25 Q. Can you tell us who those employers were.

C94rhc6

Hicks - direct

1 A. KT Marine and I also work for Village Dock.

2 Q. In September of 2010, did you work for a company called
3 Atlantic Sounding?

4 A. Yes. Weeks, I'm sorry. Yes, Atlantic Sounding.

5 Q. They are an affiliate of Weeks Marine?

6 A. Yes, they are.

7 Q. In 2010 is it true that you earned about \$58,500 in income?

8 A. Yes, it is.

9 Q. In 2011 did you work?

10 A. Not a lot, no. Well, yeah, I did work. I worked for
11 Weeks. That's actually Atlantic Sounding.

12 Q. Did you also work for KT Marine?

13 A. Yes, I did.

14 Q. Did you work for a company called Northeast Remsco?

15 A. Northeast Remsco and Caldwell Marine.

16 Q. Did you work for?

17 A. Yes.

18 Q. Did you work for a company called Dann Ocean Towing?

19 A. Yes, I did.

20 Q. Approximately how much income did you earn in 2011?

21 A. About 58.

22 MR. HOFMANN: Your Honor, we will stipulate that Mr.
23 Hicks earned \$67,000 approximately at these various jobs.

24 Q. \$67,000?

25 A. Yes, 67.

C94rhhic6

Hicks - direct

1 THE COURT: All right.

2 Q. You worked for a lot of different companies, Mr. Hicks,
3 during the period after July of 2009, correct?

4 A. Yes.

5 Q. What is your relationship with these companies now?

6 A. Each one of them said, look, Charlie, you got to get
7 better. Get this arm fixed up. At that point we'll take a
8 look at you again.

9 Q. Did they terminate your services or ask you not to come
10 back?

11 A. Yes. They asked me -- they said, look, Charlie, we can't
12 use you in this. God forbid something happens, what are you
13 going to be able to do?

14 Q. What sort of problems were you having doing this work?

15 A. I can't work out on deck, that's number one. I can't do
16 any climbing or jumping around.

17 Q. When we talk about helping out on deck, what sort of jobs
18 with these various companies that you worked for were you asked
19 to do that you felt you couldn't do?

20 A. Delivering parts, climb a ladder, help out pulling the
21 cables, putting them on above the dredging units.

22 Q. Did any of the jobs require you to handle lines?

23 A. Oh, yes.

24 Q. For whom? For which company?

25 A. Every one of them.

C94rhc6

Hicks - direct

1 Q. Did you have difficulty handling lines with your shoulder?

2 A. Yes.

3 Q. What sort of difficulty? Tell the jury.

4 A. If I try to throw a line, my arm tends to -- you have to
5 use a lot of force to throw it over, so you end up putting a
6 lot of strain on my arm itself.

7 Q. Are you right-handed or left-handed?

8 A. Right-handed.

9 Q. So you would throw with your right hand, right?

10 A. Oh, yes.

11 Q. Did you work for a company called Dann Ocean Towing?

12 A. Yes, I did.

13 Q. When did you work for them?

14 A. I don't know the exact dates. I believe it was back in
15 February.

16 Q. I'm talking about in 2011, did you work for Dann Ocean
17 Towing? Let me suggest to you, did you work in September of
18 2011 for Dann Ocean Towing?

19 MR. FORDE: Objection.

20 A. Yes.

21 THE COURT: Overruled.

22 Q. What did you do to get the job with Dann Ocean towing?

23 A. I filled out an application. I just sent it in. In return
24 what they did was I had some references down there of the
25 companies that I had worked for. I had sent it in to them.

C94rhc6

Hicks - direct

1 Probably about a week or two later they had given me a call
2 back.

3 Q. Did there come a time when for Dann Ocean Towing you were
4 requested to fill out a questionnaire that involved giving
5 answers as to your physical capacity, physical duties, physical
6 abilities?

7 A. Yes.

8 Q. And whether you had any claims against other employers?

9 A. Yes.

10 Q. Did you answer truthfully?

11 A. No.

12 Q. Can you tell the jury why.

13 A. Honestly, at 61 you put down one blemish on that paper,
14 there's 500 guys behind you at 30 that will come right in.
15 They won't give it to you.

16 (Continued on next page)

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C94VHIC7

Hicks - direct

1 Q. Were there other companies that you worked for that you
2 mentioned that you also failed to disclose that you had this
3 right shoulder injury?

4 A. Yes.

5 Q. Is the reason the same that you failed to disclose?

6 A. Yes. You just can't put anything derogatory on these
7 things.

8 Q. Charles, do you want to return to work?

9 A. Without a doubt.

10 Q. I'm sorry?

11 A. Without a doubt.

12 Q. What is it you need now to be able to physically handle the
13 job?

14 A. If I could get the surgery, get this thing patched up, I'd
15 be able to return back to work and get a full-time steady job.

16 Q. Why haven't you had the surgery?

17 A. They won't give it to me.

18 Q. Why haven't you gotten it on your own?

19 A. I don't have any medical insurance, that's No. 1. No. 2, I
20 can't afford to put it out of my pocket. I mean I tried. I
21 tried going to Charity Care; they won't do it.

22 I tried -- I even went to Dr. Charlie Rizzo, and I
23 asked him.

24 I says, Doc, is there any possible way you would give
25 me the surgery and I'll pay it little by little?

C94VHIC7

Hicks - direct

1 He said, I can't do it. It's against practice.

2 So they refused to do it.

3 Q. As part of your benefit package with Vane, did you have
4 medical insurance?

5 A. Yes.

6 Q. And when you were terminated, did you keep that medical
7 insurance?

8 A. Yes, to a certain point, but I couldn't afford it anymore.

9 Q. So you let it drop?

10 A. I had no alternative.

11 Q. You mentioned Dr. Charlie Rizzo.

12 A. Yes.

13 Q. Who is Dr. Rizzo?

14 A. He's an orthopedic surgeon.

15 Q. Had you had any treatment from him in the past?

16 A. Yeah. When I broke my knee, he was the guy that fixed it.

17 Q. Did you come under treatment with Dr. Rizzo for your right
18 shoulder?

19 A. Well, after I went to doctor --

20 Q. After Dr. Lisser, did you come under --

21 A. Yes. I went back to see Charlie for the right shoulder.

22 Q. When you say "Charlie," are you talking about --

23 A. Dr. Rizzo.

24 Q. Did Dr. Rizzo recommend, as did Dr. Lisser, that you have
25 an MRI of your shoulder?

C94VHIC7

Hicks - direct

1 A. Yes, he did.

2 Q. Did you eventually get an MRI of your shoulder?

3 A. Yes.

4 Q. And how did you obtain that?

5 A. It's embarrassing, but I'll tell it.

6 My sons lent me the money.

7 Q. And when did you have the MRI?

8 A. Back in -- I believe it was in June.

9 Q. If I suggest to you it was October 21st --

10 A. Yeah, I'm sorry. My brain is thinking of June. Back in --
11 it was in October.

12 Q. 2010?

13 A. Yes, sir.

14 Q. After having that MRI, did Dr. Rizzo recommend any course
15 of treatment for you?

16 A. He said that I needed to have the rotator cuff done again.

17 Q. How much did the MRI cost?

18 A. It was 600.

19 Q. And where was it performed?

20 A. Middletown Imaging on Route 35 in Middletown.

21 Q. I want to talk to you now about some of your prior health
22 problems that you may have had prior to working for Vane.

23 Let's talk about your right shoulder.

24 Had you ever had a right-shoulder injury prior to
25 April of 2009?

C94VHIC7

Hicks - direct

1 A. No. Never.

2 Q. Had you ever had any right-shoulder discomfort or pain for
3 which you got treatment prior to April of 2009?

4 A. Yeah. Arthritis in the shoulders.

5 Q. When did you have treatment from anybody for your right
6 shoulder?

7 A. It was by Dr. Hypplite up into about -- somewhere in the
8 area 2005.

9 Q. Dr. Hypplite, who is Dr. Hypplite?

10 A. Our general practitioner.

11 Q. Family doctor?

12 A. Yeah.

13 Q. You were treated, you said, in 2005 by Dr. Hypplite for
14 right shoulder pain; is that right?

15 A. Yeah. I had arthritis in the joints.

16 Q. What happened with respect to your right shoulder, did it
17 improve? And, if so, how?

18 A. Yeah, I had gotten a lot better from it.

19 Q. Now, I think you mentioned that you had a fractured knee.

20 A. Correct.

21 Q. How did that happen?

22 A. I fell off a roof.

23 Q. Doing what?

24 A. I was -- I went up to check on somebody, one of my sons.

25 As I came -- somebody moved the ladder. As I came down, the

C94VHIC7

Hicks - direct

1 ladder collapsed; I went with it.

2 Q. Was it at a job or at home?

3 A. Yes, at a job site.

4 Q. What other injuries did you suffer in that fall from the
5 roof?

6 A. My heel ripped off my foot.

7 Q. Did you have treatment for your ankle?

8 A. Yes.

9 Q. What treatment did you have for your ankle?

10 A. They did a fusion on my -- back of my heel.

11 Q. Of which ankle?

12 A. My left.

13 Q. Which knee was involved in this?

14 A. Right knee.

15 Q. And have you had further -- when did that accident happen?

16 A. I believe it was in '98.

17 Q. And since '98, did you have further surgery done on your
18 right knee?

19 A. Yes.

20 Q. What was that?

21 A. They did a knee replacement.

22 Q. And when was that?

23 A. That was back in 2003.

24 Q. Have you also had surgery to your spine in the past?

25 A. To my -- well, my neck fusion, yes.

C94VHIC7

Hicks - direct

1 Q. When was that?

2 A. That was in '92, 1990, '92.

3 Q. Has your left shoulder been operated on in the past?

4 A. Yeah.

5 Q. Tell us when.

6 A. At that same time, with the -- right after the fusion, a
7 couple years later they did a cleanout, rotator cuff cleanout.

8 Q. Is this around 1992?

9 A. Yes, sir.

10 Q. All right.

11 Now, after you had the left shoulder rotator cuff
12 repair in '92, did you return to work in the tugboat industry?

13 A. Yeah.

14 Q. After you had the cervical fusion, did you return to work?

15 A. Yes.

16 Q. After you had the ankle fusion or the heel fusion in 1998,
17 did you return to work?

18 A. Without a doubt.

19 Q. After you had your knee surgery and your knee replacement,
20 did you always return to work?

21 A. Yes, sir.

22 Q. If you had the surgery, do you intend -- on your right
23 shoulder, do you intend to return to work?

24 A. Yes, sir.

25 Q. Now, since -- I'm going to return to your working for Dann

C94VHIC7

Hicks - direct

1 Ocean Towing in 2011.

2 A. Yes, sir.

3 Q. Did you suffer an accident working for Dann Ocean Towing?

4 A. Yes.

5 Q. Just briefly tell the jury what happened.

6 A. I went back on the stern. I went climbing up the ladder.

7 Q. Where were you? Where were you? Stern of what?

8 A. Stern of the tug.

9 I went back to the stern of the tug to release the
10 wire, and actually pulling the stern line to tighten it up. I
11 went back to control the stern line. I pulled it up.

12 To go back into the pilot house, you have to climb up
13 a ladder. As I went up the ladder, my right arm started to
14 give way, and I felt a lot of pressure. So I grabbed with my
15 left arm. And as I grabbed, I fell, and I just twisted around
16 and fell into the pilot house.

17 Q. And did you suffer an injury?

18 A. Yes.

19 Q. What injury did you suffer?

20 A. My left arm.

21 Q. And as a result of that, did you seek medical attention?

22 A. Yes, I did.

23 Q. What medical attention did you seek?

24 A. I just went to the local emergency clinic to have them take
25 a look at it, see if -- well, actually, the company sent me to

C94VHIC7

Hicks - direct

1 St. Vincent's in Staten Island. They looked at it and they
2 said, Go home and ice it. Here's a script for this medication,
3 and that. And they sent me on my way.

4 Q. Did you then seek medical attention from a doctor in order
5 to get a either fit or not fit-for-duty slip?

6 A. Yes, I did.

7 Q. And what did you get?

8 A. She gave me a fit-for-duty slip.

9 Q. What happened to that job?

10 A. They fired me.

11 Q. Did you thereafter see Dr. Rizzo with respect to ongoing
12 complaints you had in the left arm?

13 A. In the left arm?

14 Q. Yes. Dr. Rizzo, after you fell on the Dann Ocean Towing
15 vessel.

16 A. No, not on the left arm.

17 Q. Do you recall -- all right.

18 A. I'm trying -- yes, I did call Dr. Rizzo.

19 Q. What is the condition of your left arm now?

20 A. It's getting better.

21 Q. Now, I'd like to show you what we've marked as Exhibit --
22 Trial Exhibit 30.

23 MR. FORDE: No objection, your Honor.

24 THE COURT: All right.

25 Plaintiff's Exhibit 30, admitted.

C94VHIC7

Hicks - direct

1 (Plaintiff's Exhibit 30 received in evidence)

2 Q. Mr. Hicks, is Exhibit 30 your W-2s for your earnings from
3 Vane Line Bunkering for 2008 and 2009 for the months you
4 worked?

5 A. Yes, it is.

6 MR. HOFMANN: And, your Honor, if I may just briefly
7 read the gross pay for the year 2008 is listed as \$23,919; and
8 for 2009, I think I may have said 19 -- I don't know.

9 Let me start all over again.

10 For the year 2008, it shows \$23,919. And for 2009, it
11 shows gross wages of \$28,175.

12 Q. Mr. Hicks, you earned that \$23,919 from September through
13 December for Vane; is that right?

14 A. Yes, sir.

15 Q. And the other figure for 2009 -- I apologize for walking
16 back and forth. The \$28,175 was from January 1st, 2009 through
17 April 21st, 2009; correct?

18 A. Yes, sir.

19 MR. HOFMANN: Your Honor, I'd like to offer Trial
20 Exhibit 29.

21 MR. FORDE: No objection, your Honor.

22 THE COURT: All right.

23 Plaintiff's Exhibit 29, admitted.

24 (Plaintiff's Exhibit 29 received in evidence)

25 Q. Mr. Hicks, is Exhibit 29 a group of four of your pay stubs

C94VHIC7

Hicks - direct

1 working for Vane?

2 A. Yes, sir.

3 Q. And at the time that you were working for Vane when you
4 were injured, is it true you were earning \$416.57 a day when
5 you worked as a tugboat mate?

6 A. Yes, sir.

7 THE COURT: Did you get paid just for those days that
8 you worked or were you paid -- you were two weeks on, two weeks
9 off.

10 THE WITNESS: Yes, ma'am.

11 THE COURT: Did you get paid for just the two weeks
12 that you were actually working?

13 THE WITNESS: Only when you worked. The other two
14 weeks are nothing.

15 THE COURT: Was it through Saturday and Sunday when
16 you were on here two weeks? Is it 14 days straight?

17 THE WITNESS: Yes. We started on a Wednesday, and
18 worked for two weeks.

19 THE COURT: For 14 days.

20 THE WITNESS: Yeah. We changed crew on Wednesday. It
21 was 14 days straight, and 24 hours a day.

22 BY MR. HOFMANN:

23 Q. Now, Charles, in October of 2010, did you suffer a medical
24 problem that required you to be hospitalized?

25 A. Yes.

C94VHIC7

Hicks - direct

1 Q. And where were you hospitalized?

2 A. Riverview Medical Center.

3 Q. And what was the medical problem you were treated for?

4 A. I woke up -- I was treated for an infection around the
5 heart.

6 Q. You were in the hospital from October 25th, 2010 until
7 November 5th, 2010?

8 A. Yes, sir.

9 Q. When you were there, did you have medical insurance at that
10 time?

11 A. No.

12 Q. And do you have a medical bill from the hospital for that
13 hospitalization?

14 A. 123,000.

15 MR. HOFMANN: Your Honor, I offer Plaintiff's Trial
16 Exhibit 48.

17 THE COURT: Any objection?

18 MR. FORDE: No objection, your Honor.

19 THE COURT: All right.

20 Plaintiff's Exhibit 48, admitted.

21 (Plaintiff's Exhibit 48 received in evidence)

22 Q. This is the certified copy of the medical bill for that
23 hospitalization.

24 Has that bill been paid, Mr. Hicks?

25 A. No, sir.

C94VHIC7

Hicks - direct

1 Q. And why has it not been paid?

2 A. My medical insurance lapsed.

3 Q. Are you able to afford to pay the bill?

4 A. No. With the COBRA, I couldn't even do it.

5 Q. Well, did you have COBRA insurance in October of 2010?

6 A. No, I didn't.

7 Q. Once you get patched up, do you have a plan as to how long
8 you wish to continue to work?

9 A. My father was in the industry till he was 82. I ain't
10 going that long. I'll go to maybe 70 tops.

11 Q. Now, I want to show you briefly a couple of videos,
12 Charles.

13 MR. HOFMANN: Your Honor, I'm going to offer -- I'm
14 going to offer Exhibit 45, with your permission, your Honor.

15 THE COURT: Is that Defendant's Exhibit 45?

16 MS. FARRAR: It's a defendant's exhibit, your Honor.

17 THE COURT: All right.

18 MR. HOFMANN: Yes, Defendant's Exhibit 45.

19 MR. FORDE: Obviously, we don't object.

20 THE COURT: All right.

21 There's no objection then.

22 All right.

23 Defendant's Exhibit 45 is admitted.

24 (Defendant's Exhibit 45 received in evidence)

25 MR. HOFMANN: If I may just give a little background.

C94VHIC7

Hicks - direct

1 It's just a demonstration of Texas bar, the doughnut,
2 and men doing what they are going to do.

3 (DVD played)

4 Q. Charles, you saw the videotape.

5 Is that the work you were trying to do by yourself?

6 A. Yes.

7 Q. Would you agree that that should be a two-man job?

8 A. Yes.

9 Q. And you sought to have somebody assist you; correct?

10 A. Yes, I did.

11 THE COURT: Mr. Hofmann, how much more -- just to give
12 us an idea -- you think you've got with Mr. Hicks?

13 MR. HOFMANN: About two minutes, your Honor.

14 THE COURT: Okay.

15 MR. HOFMANN: What I would like to do is offer
16 Plaintiff's Exhibit 52, which is the videotape of the
17 surveillance.

18 MR. FORDE: No objection, your Honor.

19 THE COURT: All right.

20 Plaintiff's Exhibit 52, admitted.

21 (Plaintiff's Exhibit 52 received in evidence)

22 MR. HOFMANN: And all I wish to do, your Honor, is
23 play about 30, 40 seconds, skip around, just to show little
24 snippets of it without -- defendants not having the right to
25 play the whole thing. It's 25 minutes of him doing that work.

C94VHIC7

Hicks - direct

1 MR. FORDE: Your Honor, we would object to that.

2 It was discussed that we were going to play the whole
3 thing. And this is the first time we're learning that he was
4 just going to play snippets.

5 THE COURT: These things are normally handled outside
6 of your hearing, but in the interest of time, I'm going to
7 allow him to skip, Mr. Hofmann to skip around in the interest
8 of time.

9 The entirety of Plaintiff's Exhibit 52 has now already
10 been admitted in evidence. The jury will have all of the
11 exhibits that are admitted in evidence in the jury room with
12 you. Anything that's been actually admitted into evidence, you
13 will have in the jury room with you, and you can review or look
14 at the entirety of any of those documents or the entirety of
15 the video in the jury room or have it played for you.

16 And also, of course, Mr. Forde, you can play the
17 entirety or other portions during your cross-examination of the
18 witness when it comes to that, which sounds like it will follow
19 almost immediately after this.

20 So let's go ahead and proceed with his few seconds,
21 and then turn over the witness.

22 MR. HOFMANN: I will then have one minute of
23 questioning.

24 THE COURT: All right.

25 So one minute and one minute.

C94VHIC7

Hicks - direct

1 MR. HOFMANN: Yes.

2 (DVD played)

3 BY MR. HOFMANN:

4 Q. Is that you, Mr. Hicks?

5 A. Yes.

6 Q. With your left arm on your hip?

7 A. Yes.

8 Q. Is that your grandson on the little bicycle?

9 A. Oh, you better believe it.

10 Q. Is that your son with his shirt off?

11 A. Yes, my son Steven.

12 Q. Is that your wife?

13 A. Yeah, my wife Jan.

14 Q. Okay.

15 (DVD played)

16 Q. Is this you, Charlie?

17 A. Yes, it is.

18 Q. I'll just play a minute or so of it.

19 Have you seen this tape before, Charles?

20 A. Yeah, once before.

21 (DVD played)

22 Q. What arm did you use to pick up the tree?

23 A. Left arm.

24 (DVD played)

25 Q. What are you doing there?

C94VHIC7

Hicks - direct

1 A. I was cutting some of the top -- I think the ropes they had
2 around the trunk to loosen up the sack on it.

3 (DVD played)

4 Q. Now, are you using that shovel?

5 A. Yes.

6 (DVD played)

7 Q. And this was moving the topsoil, as you said before?

8 A. Yes.

9 (DVD played)

10 MR. HOFMANN: All right, your Honor.

11 That's all I wanted to play at this point.

12 THE COURT: All right.

13 Q. And that's the videotape that Dr. Lisser indicated he
14 reviewed when he cut you off, right?

15 A. Yes.

16 Q. As you sit here today, Charles, could you tell the jury
17 what are your current complaints with respect to your right
18 shoulder?

19 A. My problem is I can't get it above my chest line, like
20 right here. I get it up to that point, I start to feel
21 tightness in the arm and a sharp pain. And you still can hear
22 the click and you can feel it. When you put your thumb on it,
23 you feel it.

24 Q. And has that been pretty much the same since you got hurt
25 on the boat?

C94VHIC7

Hicks - direct

1 A. Yes, sir.

2 MR. HOFMANN: I have nothing further at this time,
3 your Honor.

4 THE COURT: All right.

5 Thank you, Mr. Hofmann.

6 Mr. Forde.

7 MR. FORDE: Yes. I'd like to play the whole video of
8 Mr. Hicks from beginning to end, if that's all right.

9 THE COURT: All right.

10 Is there any portion of it that you feel we could just
11 sort of skip, like the beginning part on the bike?

12 MR. FORDE: Probably start somewhere around there,
13 you're right, your Honor.

14 THE COURT: Why don't we just go to the shrub or
15 something.

16 MR. FORDE: Well, hang on. I've got to talk to my
17 technical guy.

18 THE COURT: I don't want to unduly truncate it, but
19 unless he's pushing the bike...

20 (Pause)

21 THE COURT: You're making us sea sick again? That's
22 okay.

23 MR. FORDE: Just play it. It's just easier. And I
24 don't want to waste the jury's time anymore.

25 THE COURT: Mr. Forde, I'm not trying to truncate if

C94VHIC7

Hicks - direct

1 you want to play the whole thing, but I'm just thinking, if you
2 could skip over the beginning part.

3 MR. FORDE: I understand. It's just that logistically
4 I don't see how we could do this quick enough, so that it's
5 just easier to play the whole thing and then be done with it.

6 (DVD played)

7 MR. FORDE: Just note, your Honor, that it's amazing,
8 clocks are almost in sync.

9 (DVD played)

10 CROSS-EXAMINATION

11 BY MR. FORDE:

12 Q. Mr. Hicks, while we're watching it -- silent movies are not
13 my favorite -- how long approximately were you working in the
14 yard that day?

15 A. Actually, as long as this was. Actually, my son Steven dug
16 the hole for me, and -- the kid with no shirt on. And however
17 long this was, 25 minutes.

18 (DVD played)

19 Q. While doing that yardwork, did your shoulder bother you at
20 all?

21 A. I'm sorry, I wasn't paying attention. I apologize. I know
22 it's silent, but I was still watching.

23 Q. So while you were working out there on April 15, 2010, was
24 your shoulder bothering you at all?

25 A. I had some discomfort. Not a lot at all.

C94VHIC7

Hicks - cross

1 (DVD played)

2 THE COURT: Is this back at the beginning around?

3 MR. FORDE: Did it flip back around? It's beginning.

4 Okay. Thank you, your Honor.

5 Q. Okay.

6 Mr. Hicks, did you have medical coverage paid by Vane?

7 A. Yes.

8 Q. From all the way up to the point when Dr. Lisser listed you
9 as fit for duty; is that correct?

10 A. I really don't remember. And I'd be -- did I have medical
11 coverage? I probably did. I was paying for it at some
12 portion.

13 Q. Well, at one point in time you were offered COBRA; is that
14 correct?

15 A. Yes, sir.

16 Q. And then you had 60 days to opt for that COBRA; is that
17 correct?

18 A. Yes, sir.

19 Q. And you did not opt for the COBRA; is that correct?

20 A. No, I opt for the COBRA.

21 Q. Is it your testimony today that Vane did not pay for your
22 medical all the way through till the date of when Dr. Lisser
23 listed you fit for duty?

24 A. Yeah, they paid for that.

25 Q. So when you applied for the job at Vane, you had a physical

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Hicks - cross

1 where you were describing that you were being tested dragging
2 things around and what have you; is that correct?

3 A. Yes, sir.

4 Q. So that when you applied for Dann, did you also have a
5 similar test?

6 A. Dann Ocean Towing?

7 Q. Yes.

8 A. Nothing.

9 Q. However, you did receive a fit-for-duty when you applied
10 for Dann, when it was a physical; is that correct?

11 A. No, sir.

12 Q. When you went and applied to Dann Towing, you did see a
13 doctor?

14 A. Yes, sir.

15 Q. And that doctor cleared you to work for Dann; is that
16 correct?

17 A. I had gotten a fit-for-duty. I don't know if it was Dann
18 or not. I don't really remember.

19 Q. When you filled out your -- I'm going to show you what has
20 been previously marked as Plaintiff's Exhibit D-42.

21 THE COURT: Defendant's Exhibit 42?

22 MR. FORDE: Yes.

23 MR. HOFMANN: I just want to compare, Judge.

24 No objection.

25 THE COURT: All right.

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Hicks - cross

1 Defendant's Exhibit 42, admitted.

2 (Defendant's Exhibit 42 received in evidence)

3 MR. FORDE: May I approach the witness?

4 THE COURT: You may.

5 BY MR. FORDE:

6 Q. Mr. Hicks, what is Exhibit D-42?

7 A. It's an application for Dann Ocean Towing.

8 Q. And that is -- and that is in your handwriting; is that
9 correct?

10 A. Yes, sir.

11 Q. So in Exhibit D-42, you were required to list on Page 3
12 employment for at least the past ten years, with the last or
13 present employer listed first; is that correct?

14 A. Yeah, listed employment of last ten years, present employer
15 list first. KT Marine.

16 Q. Okay. You did not list Vane, did you?

17 A. No.

18 Q. Now, on this job application on Page 4, you list Great
19 Lakes; is that correct?

20 A. Yes, sir.

21 Q. Now, turning to the application for employment with Vane,
22 which has been previously marked as Exhibit D-1A.

23 MR. HOFMANN: No objection.

24 MR. FORDE: May I approach the witness?

25 THE COURT: You may.

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Hicks - cross

1 What is this 40?

2 THE DEPUTY CLERK: 1A.

3 THE COURT: I'm sorry, 1A.

4 Defendant's Exhibit 1A, admitted.

5 (Defendant's Exhibit 1A received in evidence)

6 Q. First off, what is this document, D-1A?

7 A. It's a application that I believe Dann Ocean Towing gave me
8 when I was there.

9 Q. D-1A, the second document I gave you.

10 A. This was application for employment.

11 Q. Was this the application for employment for Vane?

12 A. I guess it is, if you say so. I don't see their name on
13 here on the top. I trust you.

14 MR. HOFMANN: Look at the date.

15 Q. Yeah, look at when you signed the last page. See below
16 where it says "for personal departmental use only"? Does that
17 refresh your recollection that this was the application for
18 Vane Brothers?

19 A. Yeah, I signed this.

20 Q. Do you see just below where you signed it under reference
21 check it has the Vane Brothers Company, Vane Line Bunkering,
22 Vane Brothers Marine Safety, etc.?

23 A. Oh, yeah. I'm sorry. Yes. Right there.

24 Q. So that is the application for employment for Vane Lines;
25 correct?

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Hicks - cross

1 A. Yes, sir.

2 Q. And is this your handwriting; correct?

3 A. Yes, sir.

4 Q. Now, in the area of employment experience, on Page 3, you
5 list Enco, where you were employed from 2005 to 2008.

6 A. Yes, sir.

7 Q. And Henry Marine?

8 A. Yes, sir.

9 Q. 2005 to 2007; correct?

10 A. Yes, sir.

11 Q. Both -- you worked for the same person, but under a
12 different entity; is that correct?

13 A. No. Enco and Henry Marine are two different companies.

14 Q. Okay. But you referenced in a telephone number the same
15 identical number for each one; correct?

16 A. Yes, sir.

17 Q. Now, you worked full-time for Enco from 2005 to 2008; two
18 weeks on, two weeks off?

19 A. No.

20 Q. With respect to Henry Marine, did you work from 2005 to
21 2007, two weeks on, two weeks off?

22 A. No.

23 Q. Now, I noticed that in your turning to the Exhibit D-42,
24 neither one of these companies have been listed on your
25 application for Dann Towing; is that correct?

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Hicks - cross

1 A. Yes, sir.

2 Q. And is it also correct that Great Lakes is not listed on
3 your Vane Line job application?

4 A. No. That was back in -- never mind.

5 Q. Now, I'm going to show you what has been previously marked
6 as Exhibit D-41.

7 THE COURT: Any objection?

8 MR. HOFMANN: No.

9 THE COURT: Are you going to offer this, Mr. Forde?

10 MR. FORDE: Yes, your Honor.

11 THE COURT: All right.

12 Defendant's Exhibit D-41 into evidence, admitted.

13 (Defendant's Exhibit 41 received in evidence)

14 Q. What is Exhibit D-41?

15 A. Dann Ocean Towing.

16 Q. If I may, I'm giving you bad copies of these things. Let
17 me switch this one out. It's got a color sticker.

18 THE COURT: All right.

19 Q. And that's in your handwriting; is that correct?

20 A. Yes, it is.

21 Q. And this is a post offer of employment information; is that
22 correct?

23 A. Yes, it is.

24 Q. Turning to Item 17 on Page -- on the last page -- first
25 off, that's your signature on the bottom; is that correct?

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Hicks - cross

1 A. Yes, it is.

2 Q. And it's dated 9/12/2011; is that correct?

3 A. Yes, sir.

4 Q. Under Item 17, it lists -- it states: Have you ever been
5 temporarily or permanently injured or disabled while working
6 for a previous employer?

7 A. Yes.

8 Q. You checked off no; is that correct?

9 A. Yes, sir.

10 Q. And under that it also said: If yes, explain on the back
11 of this page. Is that correct?

12 A. Yes, sir.

13 Q. No. 18, Item 18: Have you ever received workers
14 compensation or maintenance payments. Is that correct?

15 A. Yes, sir.

16 Q. And you checked off no.

17 A. Yes, sir.

18 Q. And that, too, has: If yes, explain on the back of this
19 page. Is that correct?

20 A. Yes, sir.

21 Q. And No. 19: Have you ever sued or filed a complaint
22 against a former employer for any reason?

23 And you checked off no. Is that correct?

24 A. Yes, sir.

25 Q. And again, it has: If yes, please explain on the back of

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Hicks - cross

1 this page. Is that correct?

2 A. Yes, sir.

3 Q. Now, you listed on your Dann Ocean Towing as one of your
4 places that you worked for was Great Lakes. And it was during
5 the period of 2004 to 2005; is that correct?

6 A. Yes, sir.

7 Q. Okay. But that's not the first time you ever worked for
8 them; is that correct?

9 A. No.

10 Q. You actually worked for them back in 1991; is that correct?

11 A. Yes, sir.

12 Q. And back in 1991, you got injured on a Great Lakes tug and
13 barge on the sand scale; is that correct?

14 A. Yes, sir.

15 Q. And you saw a doctor with respect to that injury; is that
16 correct?

17 A. Yes, sir.

18 Q. And that's the injury you received the fusion in your
19 spine, and you also received permanent nerve damage in your
20 left arm; is that correct?

21 MR. HOFMANN: I'm going to object to the compound.

22 THE COURT: All right.

23 Why don't you take them one at a time, Mr. Forde.

24 MR. FORDE: Okay.

25 Q. It was during that -- while working for Great Lakes, that

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Hicks - cross

1 you injured your cervic which required surgery and fusion of
2 several --

3 THE COURT: Vertebrae.

4 A. Four, five, six.

5 MR. FORDE: Thank you.

6 Q. Huh?

7 A. Four, five, six.

8 Q. Okay.

9 And it's also this injury that you -- I mean this
10 incident on Great Lakes that you suffered permanent nerve
11 damage in your left hand -- left arm; is that correct?

12 A. That I don't know about. I don't remember that part.

13 Q. Do you remember the part where you claimed that your
14 injuries were due to an incompetent mate?

15 A. Yes, sir.

16 Q. And that you had a doctor that testified that you were
17 permanently disabled and would frequently be subject to losing
18 your balance?

19 MR. HOFMANN: Objection.

20 THE COURT: Overruled.

21 A. At that time, yes.

22 Q. And you retained counsel and commenced a lawsuit against
23 Great Lakes; is that correct?

24 A. Yes, I did.

25 Q. And in that lawsuit, you claimed that you could no longer

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Hicks - cross

1 work, and you ultimately settled for about \$750,000; is that
2 correct?

3 MR. HOFMANN: Objection.

4 THE COURT: Overruled.

5 A. Yes, I -- we settled for 750.

6 Q. Okay.

7 And in that Great Lakes lawsuit, you claimed to need
8 receive maintenance and cure; is that correct?

9 A. I don't remember what it was they asked for.

10 Q. In this matter, you are suing Vane for what, in effect, is
11 negligence due to an incompetent crew; is that correct?

12 A. I wouldn't say incompetent. I would say negligent in not
13 doing what they had to do.

14 Q. Well, in the Great Lakes case, you alleged that the mate
15 was supposed to be helping you out on a two-man job
16 disconnecting two sand barges; is that correct?

17 MR. HOFMANN: Objection, your Honor.

18 THE COURT: Overruled.

19 A. The mate was brand-new on the boat. Two days. He just
20 started steering. They put him on the boat. And they put
21 another guy out on the barge. They sent me out to work on the
22 barge.

23 Q. Okay.

24 You are alleging in this current matter that it was a
25 new captain on the boat, and that he was incompetent in

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Hicks - cross

1 operating the tow winch; is that correct?

2 A. On what we were doing up in there?

3 Q. Yes.

4 A. No, that's not correct.

5 THE COURT: Mr. Forde, just for your planning
6 purposes, we are going to end in four minutes for the day; not
7 before, but not after, exactly four minutes from now.

8 MR. FORDE: I'll get a couple more questions in.

9 THE COURT: All right.

10 BY MR. FORDE:

11 Q. In 19 -- on October 6th, 1995, you were in an automobile
12 accident in which you received personal injury and hurt your
13 neck; is that correct?

14 MR. HOFMANN: Objection, your Honor.

15 THE COURT: Overruled.

16 A. Not -- something about it. I had a sprain on the neck and
17 whiplash at that time.

18 Q. And you sued -- you commenced a lawsuit in that case; is
19 that correct?

20 A. Yes, I did.

21 Q. Okay.

22 And you received compensation or some sort of a
23 settlement in that case; is that correct?

24 A. Well, for the car damages and the loss of work.

25 THE COURT: I don't think you need to go into the

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Hicks - cross

1 amount.

2 MR. FORDE: It was a one shot.

3 THE COURT: Right. Just to make sure.

4 Q. That same day you also sued your wife in that car accident;
5 is that correct?

6 A. Sued my wife in that car accident?

7 Q. Yes.

8 A. No.

9 Q. On 11/28/1995, you were in another automobile accident
10 alleging personal injury. Did you commence a lawsuit in that
11 case?

12 A. No.

13 MR. HOFMANN: Objection, your Honor.

14 THE COURT: Overruled.

15 Q. In September 1998, you fell off the roof of your house,
16 right?

17 A. Customer's house.

18 Q. Okay. Customer's house.

19 You sued your wife.

20 A. Yes.

21 Q. You sued the manufacturer of the ladder, right?

22 A. Correct.

23 Q. You sued Home Depot, I guess, for selling you the ladder?

24 A. Well, they bundled it all up, because that's what you have
25 to do, according to the law.

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Hicks - cross

1 Q. In that one, you hurt your neck and your back and your
2 foot; is that correct?

3 A. Yes.

4 Q. You also claimed workers compensation for Mom's Three Sons,
5 Inc., located at Five Chanowich Court, your home address; is
6 that correct?

7 A. That's my wife.

8 MR. HOFMANN: Again, objection, your Honor.

9 THE COURT: Overruled.

10 One minute.

11 MR. FORDE: One minute.

12 I might be able to get one more of these.

13 Q. On February 10, 2002, you got into another auto accident
14 where you sued MTS Construction Corporation; is that correct?

15 A. No, that's not correct.

16 Q. Did you claim workers compensation on that one?

17 A. No.

18 Q. Did you complain about neck and back pain?

19 MR. HOFMANN: Objection, your Honor.

20 THE COURT: To which question?

21 MR. HOFMANN: The previous question.

22 THE COURT: Well, he said no, that's not correct. So
23 I think it's okay.

24 Overruled.

25 THE COURT: Why don't we have the court reporter --

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Hicks - cross

1 why don't you restate the question -- oh, we're at 5 o'clock.

2 Save that question for tomorrow.

3 MR. FORDE: Saved.

4 THE COURT: All right.

5 Ladies and gentlemen of the jury, we are going to
6 adjourn for the evening. We'll pick up tomorrow morning at
7 9:30. So we'll start the testimony promptly at 9:30. If you
8 could be here a few minutes before that and get yourself all
9 ready so we can waltz you out at 9:30, that would be very
10 helpful. So we could then just go until 12:45 again.

11 We'll have a break in the mid morning, and then we'll
12 take a lunch from 12:45 to 2, right, Joe? Then we'll go from
13 then until -- I've got -- I have to go to an induction for a
14 new judge at 4 o'clock, so I've got about 20 minutes, takes me
15 20 minutes. I run down, run back. So we'll try to time our
16 mid afternoon break for that, and come back and then go till 5.

17 All right. So that's the schedule for tomorrow.

18 And, again, don't talk to anybody about this case.
19 Don't talk to each other. Keep an open mind. There's still a
20 lot of evidence to come in.

21 Thank you very much.

22 (Jury excused)

23 THE COURT: All right. You can step down, Mr. Hicks.

24 (Witness excused)

25 THE COURT: Why don't you all be seated.

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1 I just want to make sure we all know where we're going
2 and if there are any issues to raise.

3 First, Mr. Hofmann, I just want to make sure I
4 understand the basis and nature of the objections which I was
5 overruling that you were raising to the various lawsuits.

6 MR. HOFMANN: If I may.

7 THE COURT: Sure.

8 I was assuming that you were doing a 403 objection.

9 MR. HOFMANN: It's first on relevance.

10 THE COURT: All right.

11 Well, it goes to credibility.

12 All right.

13 Anyway, give me your basis.

14 MR. HOFMANN: I would like to discuss that.

15 What credibility issue is being resolved?

16 THE COURT: I'm not going to actually debate. You
17 tell me your bases, and I'll tell you whether or not I feel
18 comfortable with my ruling.

19 401, overruled.

20 Give me the next one.

21 MR. HOFMANN: May I at least make a record, your
22 Honor?

23 THE COURT: Sure.

24 MR. HOFMANN: A man having car accidents and injuring
25 other parts of his body is not relevant. He's never said that

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1 he never had car accidents. And to attempt to besmirch his
2 credibility by saying that he's had car accidents and perhaps
3 brought workers comp claims or personal injury claims in court
4 somehow affects his credibility here with this industrial
5 accident is too far afield for it to be relevant. And so the
6 prejudice of this line of questioning, in my opinion, greatly
7 outweighs --

8 THE COURT: Okay. So that's a 403.

9 Mr. Hofmann, I'm not trying to give you a hard time.
10 For the record, I want to make sure we've got everything clear.

11 MR. HOFMANN: I'm just making my record.

12 THE COURT: So 401 and 403.

13 MR. HOFMANN: Right.

14 THE COURT: All right.

15 Mr. Forde, do you want to say anything?

16 MR. FORDE: Well, it is going towards his credibility.
17 It's also going towards a pattern. There's case law out there
18 that allows these type of -- while generally, you know, they
19 are not allowed in, this is a lot. I mean this establishes a
20 pattern that may actually establish something that I think --
21 the Second Circuit has ruled recently that it's -- was it
22 recently? Credibility and pattern under *Tomaino v. O'Brien*,
23 315 Fed. Appx. 359-361, 2009. 359 at 361.

24 We got other Second Circuit cites under 404(b).
25 Evidence of other acts is not admissible to prove character of

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1 a person in order to show action performing therewith. It may,
2 however, be admissible for other purposes. And that case is
3 *Houtly v. City of New York*, 837 FTD 587 at 593 (2d. Cir.
4 Circuit 1988). *Young v. Calhoon*, 1995 Westlaw 169020,
5 (S.D.N.Y. 1995). And it's also admissible showing prior
6 injuries that might be relevant. And that would be *Brewer v.*
7 *Jones*, 222 Fed. Appx. 69-71. I might have screwed up that
8 cite. Second Circuit 2007.

9 MR. HOFMANN: Will you try it again, Jim.

10 MR. FORDE: Oh, sorry.

11 222 Fed. Appx. 69, 69-71, (2d Cir. 2007).

12 (Continued on next page)

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1 Finally, your Honor, they opened the door with the
2 Dann application showing that he lied and that he never had any
3 litigation. I think I have a right to keep pursuing it.

4 THE COURT: Here is my ruling. I, number one, find
5 that it is relevant. It certainly goes to the issue of
6 credibility. The jury will do with it what they do with it.
7 I'm not suggesting that it shows that the witness lacks
8 credibility, but I think it goes fairly to the issue of whether
9 or not the witness is credible in all that he says. They may
10 find that it is so or not so, as they see fit.

11 Under 403 I don't believe that its relevance is
12 substantially outweighed by the danger of unfair prejudice.
13 There is certainly not going to be any confusion of issues or
14 misleading the jury, so the question is whether or not it is
15 outweighed by unfair prejudice.

16 In this situation the credibility of the witness is
17 obviously the critical issue, I think, in this trial. I
18 haven't seen the rest of the testimony that the medical
19 professionals may bring in, but it is certainly going to be one
20 of the critical issues as was stated at the various openings.

21 So I stand by my ruling. You all made your record.
22 It is what it is. We'll proceed.

23 Is there going to be more of this tomorrow, Mr. Forde?

24 MR. FORDE: Yes, there is. I'm sorry.

25 THE COURT: There may come a point when you have made

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1 your point. What I would suggest is based upon my rulings
2 today, what you do is preview with the Court tomorrow
3 generically. I'm not asking you to give away the secrets of
4 your cross, but generically what you are going to be doing at
5 our 9 o'clock session so we can have a sense of where we are
6 going to go. If there are going to be 20 more of these, I
7 don't know that we need to go through all of them. If there
8 are two more, that's different. All right?

9 MR. FORDE: Yes, your Honor.

10 THE COURT: Let's talk about this tomorrow at 9
11 o'clock. How much cross-examination are you going to have with
12 this witness in addition to this?

13 MR. FORDE: Best estimates, I would probably say an
14 additional 45 minutes to an hour.

15 THE COURT: That will be helpful. Next we go to Mr.
16 Rizzo's videotape deposition, Mr. Hofmann?

17 MR. HOFMANN: Yes, Judge. Actually, is Lusardi
18 definitely on?

19 MR. FORDE: Lusardi is here. He has the whole day. I
20 thought it would make more sense if Lusardi bridged both of us.
21 That's just me.

22 THE COURT: How would you like to do it?

23 MR. HOFMANN: I would prefer to put on Mr. Lusardi,
24 since he is going to be here, and let him get on with his life.
25 Then we will do Dr. Rizzo's disposition.

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1 MR. FORDE: I have no objection.

2 THE COURT: We'll finish Mr. Hicks tomorrow morning
3 first thing, then do Mr. Lusardi, and after that you will
4 proceed as you see fit. You mentioned Mrs. Hicks or the Rizzo
5 deposition.

6 Let me give you one reminder. No one should be
7 talking or saying anything at all to the jurors. It was
8 brought to my attention, and I'm sure this was inadvertent, I
9 attribute no bad intent to this, that I think it was Mr. Hicks,
10 or at least it was the juror believed it was Mr. Hicks, that
11 Mr. Hicks may have said to a juror after the lunch break, you
12 better hurry up and go smoke if you're going to go smoke or
13 something to that effect.

14 There may have been some misunderstanding that my
15 admonition about not speaking to any jurors applies to the
16 parties as well as counsel. We don't want the jurors to
17 believe that there has been any pressure put upon them to come
18 out one way or the other or any kind of relationship that's
19 been developed or not developed. So, as a result, just to
20 prevent anybody from having any issues and discussions about
21 jurors, we make an across-the-board rule. I just wanted to
22 give a very soft reminder to that.

23 Anything else people would like to raise?

24 MR. HOFMANN: No, your Honor.

25 MS. FARRAR: I have a question. You mentioned this

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1 morning that you were going to discuss jury charge tomorrow
2 morning at 9:00.

3 THE COURT: Thank you for reminding me. I had been
4 going through one last piece, and it has to do with attorney's
5 fees. There is a portion of the charge which has been used in
6 the past that relates to if there is a finding of willfulness,
7 will we awarded attorney's fees. I am convinced that if
8 willfulness is found, which would be a special question on the
9 verdict form, attorney's fees are awardable. I don't think it
10 is up to the jury at this point in time to put down the amount
11 of attorney's fees.

12 MR. HOFMANN: Exactly, your Honor. I thought of this
13 and I wanted to address it. If they answer the question in the
14 affirmative, then I think it would be for the Court. I think
15 there are some cases recently that say that that would be an
16 issue for the Court.

17 THE COURT: That would make the most amount of sense.
18 That is how it is typically done in other cases, where you
19 would submit your backup and we would determine what was
20 reasonable.

21 MR. HOFMANN: Exactly.

22 THE COURT: We will make that change. We will
23 circulate them by email this evening. I apologize for the
24 lateness of it, but we were going back and forth a little bit
25 on that where I was saying I'm really not convinced on this

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1 one. That's why I was handing it over. I do apologize for
2 getting it to you so late. If we can't do all of it tomorrow
3 morning, then we'll do it at the mid-morning break.

4 MR. HOFMANN: As to that issue of where I thought I
5 was going to be offering additional jury questions, I re-reread
6 it and then said I already covered the issue. So I'm not
7 offering anything further.

8 THE COURT: OK. You may have another opportunity to
9 offer that if it turns out that we have excluded it from what
10 we have drafted. We'll send everything by email this evening
11 very shortly. Thank you. We are adjourned for tonight.

12 (Adjourned to 9:00 a.m., September 5, 2012)

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